United States District Court,
W.D. Texas, Austin Division.

Harold R. LUHN and Luther J. Hueske,
Plaintiffs.
v.
Cecil SCOTT and, Armor Products, Inc,
Defendants.

No. A-04-CA-521-LY

May 26, 2006.

C. Vernon Lawson, Matthews, Lawson, Bowick & Al-Azem, PLLC, Robert M. Bowick, The Matthews Firm, Houston, TX, for Plaintiffs.

Rick B. Yeager, Attorney at Law, Austin, TX, for Defendants.

MEMORANDUM OPINION AND ORDER

LEE YEAKEL**, District Judge.**

Before the Court are (1) Harold J. Luhn and Luther J. Hueske's Pre-hearing *Markman* Initial Brief filed June 7, 2005 (Doc. # 13); (2) the *Markman* Brief of Defendant filed June 7, 2005 (Doc. # 14); and (3) Harold J. Luhn and Luther J. Hueske's *Markman* Reply Brief filed June 16, 2005 (Doc. # 16). The Court conducted a claims-construction hearing on June 22, 2005. After considering the pleadings; patent-in-suit and its prosecution history; argument of counsel; and relevant case law, the Court issues the following order.

I. Introduction

Plaintiffs Harold J. Luhn and Luther J. Hueske (together "Luhn") accuse Defendants Cecil Scott and Armor Products, Inc. (together "Armor") of infringing claims contained in United States Patent No. 6,105,354 ("the '354 Patent"). The '354 Patent, of which Luhn and Hueske are named co-inventors, is directed at an improved, self-contained rake apparatus for gathering cut materials. Claims 1 and 13, an apparatus and method claim, respectively, are the only independent claims in the '354 Patent. These claims have been asserted by Luhn in this patent-infringement action pursuant to 35 U.S.C. s. 271. Luhn and Armor dispute two claim terms within claims 1 and 13: "rake" and "rear wheel assembly." *See* '354 Patent, Col. 8, ll. 48, 62; col. 9, ll. 43, 55. Presently before the Court are the parties' requests for construction of disputed claim language within the patent-in-suit pursuant to Markman v. Westview Instruments, Inc., 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996).

II. Applicable Law

It is well established that determining infringement is a two-step process. *See* Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed.Cir.1995) (*en banc*), *aff'd,* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996) ("[There are] two elements of a simple patent case, construing the patent and determining whether infringement occurred ...."). First, the meaning and scope of the relevant claims must be ascertained. *Id*. Second, the properly construed claims must be compared to the accused device. *Id*. Step one, claim construction, is the current issue before this Court.

Patent claims are construed as a matter of law. *Markman,* 517 U.S. at 352. To ascertain the meaning of claims, the court looks primarily to the intrinsic evidence: the claims, the specification, and the patent's prosecution history. Phillips v. AWE Corp., 415 F.3d 1303, 1314-17 (Fed.Cir.2005) (*en banc*); Markman, 52 F.3d at 979. The specification must contain a written description of the invention that enables one of ordinary skill in the art to make and use the invention. Markman, 52 F.3d at 979; 35 U.S.C. s. 112, para. 1. A patent's claim must always be read or interpreted in the light of the specification. Phillips, 415 F.3d at 1316. For claim-construction purposes, the specification may reveal "a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such cases, the inventor's lexicography governs." *Id*. Indeed, the specification's written description "may act as a sort of dictionary, which explains the invention and may define terms used in claims." Markman, 52 F.3d at 979. "One purpose for examining the specification is to determine if the patentee has limited the scope of the claims." Watts v. XL Sys., Inc., 232 F.3d 877, 882 (Fed.Cir.2000). Although the specification may indicate that certain embodiments are preferred, particular embodiments appearing in the specification will not be read into a claim when the claim language is broader than the embodiment. Electro Med. Sys., S.A. v. Cooper Life Scis., Inc., 34 F.3d 1048, 1054 (Fed.Cir.1994). The court must also be mindful that "when a patentee uses a claim term throughout the entire specification, in a manner consistent with only one meaning, he has defined that term by implication." Bell Atl. Network Servs., Inc. v. Covad Commc'ns Group, Inc., 262 F.3d 1258, 1271 (Fed.Cir.2001). However, "case law is clear that an applicant is not required to describe in the specification every conceivable and possible future embodiment of his invention .... [I]n short, it is the claims that measure the invention, as informed by the specification." *Rexnord Corp. v. Laitram Corp.,* 214 F.3d 1336, 1344 (Fed.Cir.2001). It is axiomatic that although claims must be read in light of the specification, limitations from the specification may not be imported into the claims. Playtex Prods., Inc. v. Proctor & Gamble Co., 400 F.3d 901, 906 (Fed.Cir.2005).

The "words of a claim 'are generally given their ordinary and customary meaning.' " Phillips, 415 F.3d at 1312 (quoting Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996)). "[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective date of the patent application." Phillips, 415 F.3d at 1313 (citing Innova/Pure Water, Inc. v. Safari Walter Filtration Sys., Inc., 381 F.3d 1111, 1116 (Fed.Cir.2004); Home Diagnostics, Inc. v. LifeScan, Inc., 381 F.3d 1352, 1358 (Fed.Cir.2004); Ferguson Beauregard/Logic Controls v. Mega Sys., LLC, 350 F.3d 1327, 1338 (Fed.Cir.2003)). There is a "heavy presumption in favor of the ordinary meaning of claim language." Johnson Worldwide Assoc. v. Zebco Corp., 175 F.3d 985, 989 (Fed.Cir.1999). Although extrinsic evidence, such as dictionaries, may be helpful to the court, such evidence is less reliable than intrinsic evidence. Phillips, 415 F.3d at 1318. Extrinsic evidence may be useful when considered in the context of the intrinsic evidence, id. at 1319, but it cannot "alter a claim construction dictated by a proper analysis of the intrinsic evidence." *On-* Line Techs., Inc. v. Bodenseewerk Perkin-Elmer GmbH, 386 F.3d 1133, 1139 (Fed.Cir.2004).

III. Claim Construction

The parties dispute two claim terms. These terms, both found in claims 1 and 13 of the '354 Patent, are "rake" and "rear wheel assembly."

A. "Rake"

1. Luhn's Proposed Construction

Luhn proposes that the disputed term "rake" be construed to mean "an apparatus for raking or gathering materials." FN1 The primary support for this construction is the ' 354 Patent itself and the broad stroke with which it describes this element. *See* ' 354 Patent, Col. 1, ll. 8-9 ("[t]his invention relates ... to a self-contained, pullable rake"); col. 3, ll. 24-25 ("[t]he inventors ... have devised a raking apparatus"); col. 3, ll. 34-38 ("both the rake mechanism and the baler ... operate in the identical manner"). The ' 354 Patent does not expressly limit the term "rake" to any configuration or type of device. Thus, Luhn argues that this broad term was specifically used to include all commercial devices within the relevant field of hay-gathering, such as bar rakes, wheel rakes, and rotary rakes, among others.

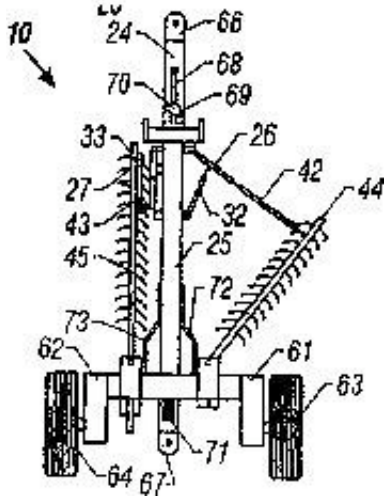
FN1. Luhn has also provided a dictionary definition of "rake." Although the meaning of a lay term, such as "rake," may be determined by referencing a general purpose dictionary, Phillips, 415 F.3d at 1314, the intrinsic evidence is the best evidence of the term's meaning within the relevant art. *Id*.

Additionally, Luhn argues that the prosecution history of the '354 Patent supports a broad construction. Prior art cited by the examiner during prosecution of the '354 Patent included U.S. Patents Nos. 5,685,135 ("the '135 Patent") and 4,214,428 ("the '428 Patent"). These two patents included wheel rakes as the chosen raking apparatus. As neither the examiner nor Luhn distinguished the '354 Patent's raking apparatus from these pieces of prior art, it is argued that no disclaimer occurred as to the scope of the term "rake." Therefore, Luhn urges that the term be construed broadly.

Finally, Luhn presents the conclusion that his proposed construction is not only supportable by the intrinsic evidence, but also consistent with what one of ordinary skill in the art would understand as the "ordinary and customary meaning," *see* Phillips, 415 F.3d at 1313, of the disputed term.

2. Armor's Proposed Construction

Not surprisingly, Armor offers a different construction of the disputed term "rake." This construction is "a bar rake; not a wheel rake." Armor posits, as support for this construction, several arguments. First, Armor asserts that Fig. 1 of the '354 Patent depicts a bar rake. *See* '354 Patent Fig. 1, elements **44** and **45.**



Also, Armor argues that Luhn has never built, sold, or offered for sale a device described in the '354 Patent with anything but a modified bar rake. Therefore, Armor urges that only bar rakes should be included under this claim term.

Finally, Armor offered the testimony of Defendant Cecil Scott, in which he claimed that a rotary rake could not function within the '354 Patent for two reasons. First, Scott stated that the Power Take-Off (PTO) element of the ' 354 Patent could not work with rotary rakes. Second, he stated that the use of a rotary rake would not allow a towed baler to operate correctly behind the apparatus claimed in the '354 Patent. Thus, Armor argues that to include rotary rakes within the definition of the disputed claim term "rake" would broaden the scope of the '354 Patent to cover an apparatus that is not physically operable.FN2

FN2. Armor's reliance on the testimony offered by Scott is misplaced. Expert and inventor testimony, although extrinsic evidence and thus less reliable than intrinsic evidence, may be utilized by a court during claim construction. Phillips, 415 F.3d at 1317. However, this evidence is less reliable than intrinsic evidence, because it is "generated at the time of and for the purpose of litigation and thus can suffer from bias that is not present in intrinsic evidence." Id. at 1318. In the present situation, this Court heard testimony not from a neutral expert, but from one of the Defendants. Although Scott may have vast experience in the hay-baling industry, the possibility of bias within his testimony exceeds even such bias within expert testimony as noted by the *Phillips* court. Therefore, Scott's testimony that "rotary" rakes must be excluded from the construction of the disputed term is unpersuasive. The Court further notes that Armor has offered other extrinsic evidence, including: a website on the topic of commercial rakes; a website with news articles regarding inventions within the field of commercial hay gathering devices, including Luhn's; an advertisement for Luhn's "Rakehand" device; and photographs of Armor's commercial device. However, most of this extrinsic evidence does nothing to assist in construing the term "rake" and only compares the parties' commercial embodiments. Although the website on the topic of commercial rakes is informative as to the types of commercial rakes available, it does not convince the Court that the '354 Patent has limited the term "rake" to one type or another.

3. Construction of the Court

A patentee may specially define a patent term, in which case "the inventor's own lexicography governs."

Phillips, 415 F.3d at 1316. In this case, it is clear that Luhn did not explicitly define the term "rake" within the '354 Patent; neither party argues otherwise. Also clear is the fact that Luhn did not expressly disavow any construction of the term during prosecution of the ' 354 Patent. Although not as clear as the patent itself, the prosecution history may demonstrate "how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." Id. at 1317. Therefore, the correct construction must be that which one of ordinary skill in the art would understand the term to mean in light of the entire patent. Id. at 1313.

The Court construes the disputed claim term "rake" as ***a frame-mounted apparatus for linearly gathering cut material.*** This construction finds support within the intrinsic record, namely the specification of the '354 Patent and its prosecution history.

In particular, Fig.1, which illustrates the "rake apparatus **10,**" describes a "conventional rake ... connectable to rake arms **44** and **45** ...." '354 Patent at Fig. 1; col. 5, ll. 12-14. Further, it is clear that the '354 Patent attempted to address problems concerning "gathering ... hay and other grasses ...." Id. at Col. 1, 1.62. Finally, perhaps recognizing the various commercial rakes in the market, Luhn concludes the specification by stating that the "description [of the preferred embodiment of the invention] should be construed as illustrative only of the principals of the invention." Id. at Col. 8, ll. 36-37. Although this statement cannot "magically" broaden claim language expressly narrowed by the specification, it refutes any argument that the '354 Patent's drawings or description of the preferred embodiment limit the type of rake as urged by Armor. Additionally, it is well established that the claims of a patent need not be limited to a single, preferred embodiment absent a patentee's clear intention to limit the claims' scope. *E.g.,* Liebel-Flarsheim Co. v. Medrad, Inc., 358 F.3d 898, 906 (Fed.Cir.2004).

Luhn described the "rake" of the '354 Patent and distinguished it over prior art by amendment dated January 27, 2000. Specifically, Luhn argued to the examiner that the '354 Patent's rake was "mounted with a frame" and thus distinct from Inskeep's invention. Inskeep's invention, registered as U.S. Patent No. 4,478,032 ("the '032 Patent"), is directed at a "dual implement hitch for pivotal connection to the drawbar of a towing vehicle ... whereby ... rakes ... may be selectively towed ...." '032 Patent at Abstract. Luhn distinguished Inskeep further by noting that his invention "gather[ed] raked hay ... and [fed] it to the center of the frame [element **25** in the '354 Patent] ...." Therefore, Luhn limited a "rake" in the '354 Patent as being frame-mounted and gathering cut material into a single row.

Armor's first two arguments are flawed. First, Armor argues that the construction of the disputed claim term should include the phrase "not a wheel rake." Armor has attempted to define this term in the negative, *i.e.* what it is not, with reference to its own commercial products, namely the wheel rake kit or modified H & S wheel rake. The Federal Circuit has made clear that an infringement analysis, of which claim construction is the first step, *see* Markman, 52 F.3d at 976, may occur "only after the claims have been *construed without reference to the accused device* ...." SRI Int'l v. Matsushita Elec. Corp. of Am., 775 F.2d 1107, 1118 (Fed.Cir.1985); Vivid Techs., Inc. v. Am. Sci & Eng'g, Inc., 200 F.3d 795, 803 (Fed.Cir.1999). Armor attempts to define "rake" with reference to Armor's products; thus, its construction is incorrect.

Second, Armor's proposed construction relies on evidence that all of Luhn's commercial embodiments of the '354 Patent contain a bar rake. This construction improperly relies on extrinsic evidence of a kind not approved by the Federal Circuit. The *Phillips* court, although acknowledging the decreased significance of extrinsic evidence as compared to intrinsic evidence in claim construction, recognized that expert testimony, dictionaries, and learned treatises could aid a court in construing disputed claim terms. Phillips, 415 F.3d at

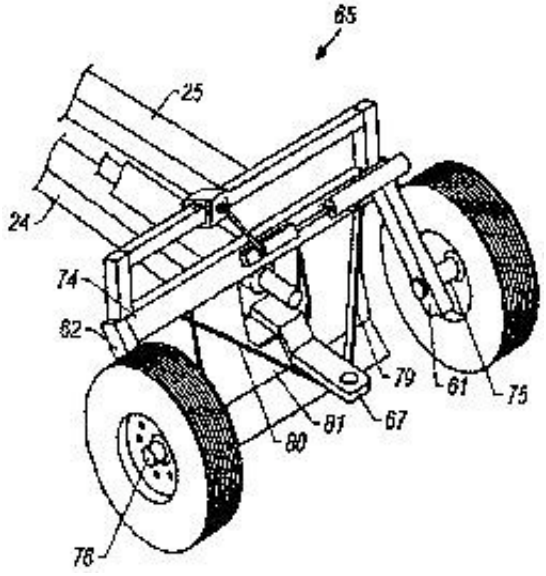
1317. Absent from the *Phillips* court's discussion of extrinsic evidence was evidence of the patentee's commercial embodiment. In fact, "it is error for a court to compare in its infringement analysis the accused product ... with the patentee's commercial embodiment or other version of the product ... the only proper comparison is with the claims of the patent." *Zenith Labs., Inc. v. Bristol-Myers Squibb Co.,* 19F.3d 1418, 1423 (Fed.Cir.1994). Although Armor notes that its wheel-rake kit has been the subject of a patent application, even a "grant of a separate patent on the accused device does not automatically avoid infringement ...." National Presto Indus., Inc. v. West Bend Co., 76 F.3d 1185, 1191 (Fed.Cir.1996).

B. "Rear wheel assembly"

1. Luhn's Proposed Construction

Luhn offers a claim construction of this disputed claim term that essentially parrots the claim term itself. Specifically, Luhn proposes that this term be construed as, "an assembly having wheels attached or mounted to the rear of the rake." Luhn asserts that this construction provides the ordinary and customary language to the disputed claim term, which is proper, as there was no special meaning given to this term within the '354 Patent or its prosecution history.

In particular, Luhn points to the specification of the '354 Patent for support. The "rear wheel assembly" (as shown below in Fig. 2 of the '354 Patent) is "load-bearing ... provided to support the rake off the ground to facilitate the safe and easy exchange of processing equipment towed by the rake ...." '354 Patent at Abstract. Also, the "rear wheel assembly [has] sufficient strength to ... enable the safe towing of ... hay processing equipment." Id. at Col. 3, ll. 40-42. Finally, the "rear wheel assembly" facilitates the pulling of the rake frame. Id. at Col. 1, ll. 12-13.



2. Armor's Proposed Construction

Armor proposes that the disputed term "rear wheel assembly" be construed as, "a replacement wheel assembly and not as the factory-supplied rear frame of an H & S wheel Rake." In support of this

construction, Armor argues that the ' 354 Patent expressly limits this term to a replacement device: "The rear wheel assembly replaces the wheel assembly normally associated with a raking apparatus ...." '354 Patent Col. 3, ll. 55-56. Thus, Armor argues that the proper construction of this disputed term limits "rear wheel assembly" to an after-market assembly purchased and installed on a commercial rake in place of the rake's factory-supplied assembly.

3. Construction of the Court

As with the disputed claim term "rake," it is clear that the '354 Patent and its prosecution history do not expressly define the disputed term "rear wheel assembly." Therefore, this Court must construe the disputed term by its ordinary and customary meaning, as understood in the context of the patent-in-suit by one of ordinary skill in the art. Phillips, 415 F.3d at 1313.

The Court construes the disputed claim term "rear wheel assembly" as ***a load-bearing wheeled device located at the rear of the rake apparatus that supports the rake and facilitates the towing and exchange of additional equipment through a pivotal connection.*** The intrinsic record fully supports this construction.

The '354 Patent and its prosecution history fully describe the "rear wheel assembly" and its functional aspects. First, this assembly is "load-bearing ... provided to support the rake off the ground to facilitate the safe and easy exchange of processing equipment towed by the rake ...." '354 Patent at Abstract. *See also* id. at Claim 1, col. 8, ll. 64-65. Second, the "rear wheel assembly [has] sufficient strength to ... enable the safe towing of ... hay processing equipment." Id. at Col. 3, ll. 40-42; Claim 1 at col. 8, 1.67-col. 9, ll. 1-2. Third, the "rear wheel assembly" facilitates the pulling of the rake frame. Id. at Col. 1, ll. 12-13.

Finally, Luhn clearly added the further limitation of a "pivotal connection" by amendment dated October 15, 1999. In this amendment Luhn distinguished the '354 Patent over two pieces of prior art (Lewis and Menichetti patents),FN3 which the examiner combined in an obviousness rejection. *See* 35 U.S.C. s. 103. The examiner asserted that the "rear wheel assembly" of Menichetti could be added to the rake apparatus of Lewis to render Luhn's claims obvious and unpatentable. Luhn argues that the ' 354 Patent taught a "rear wheel assembly" pivotally connected to the towed equipment, such as a baler. Further, Luhn argues that Lewis expressly taught away from a pivotal connection. Therefore, the "rear wheel assembly" in the ' 354 Patent must allow for a pivotal connection to the towed equipment.FN4

FN3. The Lewis invention is U.S. Patent No. 5,404,702 ("the '702 Patent"), and is directed at a "wide windrow raking apparatus." '701 Patent at Abstract. The Menichetti invention is U.S. Patent No. 5,685,135 ("the '135 Patent"), and is directed at a "V-shaped pull type rake." ' 135 Patent at Abstract.

FN4. The Court acknowledges Armor's argument that the statement made by Luhn in the referenced amendment, "This type of connection is not shown in the cited prior art[,]" appears to contradict the teaching of Inskeep. However, it seems reasonably clear that Luhn was only referring to Lewis and Menichetti with this statement through the phrase "cited prior art [,]" as the examiner cited Lewis and Menichetti in the obviousness rejection.

The portion of Armor's claim construction that references the Armor commercial rake is erroneous, as claim construction must proceed without reference to the accused device. *See* Vivid Techs, 200 F.3d at 803.

Further, although Armor's argument regarding the temporal aspect of the installation of the "rear wheel assembly" has merit, it ultimately fails to persuade the Court that the assembly must be a replacement device.

In the '354 Patent's Summary of Invention, Luhn states, "The rear wheel assembly replaces the wheel assembly normally associated with a raking apparatus ...." '354 Patent, Col. 3, ll. 55-56. This statement could be read to support Armor's argument. However, it also could be read merely as a statement distinguishing this component of the '354 Patent from typical wheel assemblies found in prior-art commercial rakes. The latter reading is preferable according to the teachings of the '354 Patent.

Statements in a patent's summary may apply to each claim, because the summary is directed to the invention as a whole. C.R. Bard, Inc. v. U.S. Surgical Corp., 388 F.3d 858, 864 (Fed.Cir.2004). Therefore, it may be argued that regardless of what Luhn claimed as the preferred embodiment of the invention, each embodiment must include a replacement "rear wheel assembly." However, limitations from the specification must not be read into claims. Playtex Prods., 400 F.3d at 906. In this case, adding the limitation that the "rear wheel assembly" must be a replacement assembly would completely change the nature of the invention of the '354 Patent. The '354 Patent claims and describes a "rake apparatus." Should the "rear wheel assembly" be construed to replace an assembly included on a commercial rake purchased by a manufacturer of Luhn's invention, there would be no need to claim nor describe the "rake apparatus." Essentially, Luhn's invention would be reduced from a "rake apparatus" that includes the component of a "rear wheel assembly" to only a "rear wheel assembly" used to modify commercial rakes. It seems clear that Luhn described and claimed the invention to include the rake itself; to eliminate this part of the invention through the construction of the disputed term "rear wheel assembly" is improper.

IV. Conclusion

For the above reasons, the Court construes the disputed claims as noted. No further claim terms require construction.

W.D.Tex.,2006.
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