

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

POWER PROBE GROUP, INC.,
Plaintiff-Appellant

v.

INNOVA ELECTRONICS CORPORATION,
Defendant-Appellee

2021-2354

Appeal from the United States District Court for the District of Nevada in No. 2:21-cv-00332-GMN-EJY, Judge Gloria M. Navarro.

Decided: April 12, 2022

SAMUEL ALEXANDER LONG, JR., Shumaker, Loop & Kendrick, LLP, Charlotte, NC, argued for plaintiff-appellant. Also represented by TOM BENGERA, LUCAS D. GARBNER; JAMES DANIEL BOYLE, Holley Driggs, Las Vegas, NV.

KENNETH ROBERT ADAMO, Law Office of KRadamo, Chicago, IL, argued for defendant-appellee. Also represented by RICHARD P. BEEM, ALEX SHTRAYM, Beem Patent

Law Firm, Chicago IL; JARED M. MOSER, Marquis Aurbach
Coffing, Las Vegas, NV.

Before NEWMAN, LOURIE, and TARANTO, *Circuit Judges*.

LOURIE, *Circuit Judge*.

Power Probe Group, Inc. (“Power Probe”) appeals from a decision of the United States District Court for the District of Nevada denying a preliminary injunction against further sales of Innova Electronics Corporation’s (“Innova”) Powercheck #5420 device (the “Accused Product”). *See Power Probe Grp., Inc. v. Innova Elecs. Corp.*, No. 21-cv-332, 2021 WL 4484571 (D. Nev. Sept. 15, 2021) (“*Decision*”).

Because the district court erred in its preliminary claim construction, we *vacate* its decision denying a preliminary injunction and *remand* for further proceedings consistent with this opinion.

BACKGROUND

Power Probe owns U.S. Patent 7,184,899 (the “899 patent”). The patent is directed to an electrical test device having multi-meter functionality that measures a plurality of parameters. Independent claim 1 reads in part as follows.

1. An electrical test device having multimeter functionality and being adapted to provide current sourcing to an electrical system for *selective measurement of a plurality of parameters* thereof in at least one of powered and unpowered states, the electrical test device comprising:

. . . .

’899 patent at col. 11 ll. 29–51 (emphasis added). Dependent claim 3 includes additional components used in “detecting continuity in the electrical system.” *Id.* at col. 12 ll. 2–

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3. Dependent claim 10 includes an additional limitation “wherein the parameters measurable by the test device include at least one of circuit continuity, resistance, voltage, current, load impedance and frequency.” *Id.* at col. 12 ll. 21–24. Dependent claim 12 further includes “a pair of signal lamps connected to the processor and configured to illuminate in response to continuity measurement.” *Id.* at col. 12 ll. 52–54.

Power Probe sued Innova in the district court, alleging that the Accused Product infringes claims 1, 2, 5–10, 12, and 13 of the ’899 patent. Additionally, Power Probe moved for a preliminary injunction against further sales of the Accused Product during the pendency of the litigation.

In ruling on Power Probe’s motion for a preliminary injunction, the district court first held that “measurement” in the claims means determining “a numerical or quantitative value associated with and indicative of the parameter under test.” *Decision* at *4. The court then conducted a preliminary claim construction and held that a “plurality of parameters” means “at least two parameters.” *Id.* at *5. The court then noted that the Accused Product measures only one parameter, voltage.

The district court added that “continuity” is “the presence of a complete path for current flow” and cannot be directly measured but can be detected as either existing or not. *Id.* Based on this determination, the court found that the Accused Product detects, but does not measure, continuity. Accordingly, the court denied Power Probe’s motion for a preliminary injunction because it failed to establish a likelihood of success in proving infringement. It did not evaluate the other factors necessary for the grant of a preliminary injunction.

Power Probe appealed the district court’s denial of its preliminary injunction motion. We have jurisdiction pursuant to 28 U.S.C. §1295(a)(1).

DISCUSSION

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). An accused infringer can defeat a showing of likelihood of success on the merits by demonstrating a substantial question of validity or infringement. *See Aria Diagnostics, Inc. v. Sequenom, Inc.*, 726 F.3d 1296, 1304 (Fed. Cir. 2013). A preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22.

“The grant, denial, or modification of a preliminary injunction . . . is not unique to patent law, so this court applies the law of the regional circuit when reviewing and interpreting such a decision.” *Aevoe Corp. v. AE Tech Co.*, 727 F.3d 1375, 1381 (Fed. Cir. 2013). The Ninth Circuit “review[s] the district court’s grant of a preliminary injunction for abuse of discretion.” *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1014 (9th Cir. 2013).

We have “built a body of precedent applying the[] general [preliminary injunction] considerations to a large number of factually variant patent cases, and [] give dominant effect to [our] precedent insofar as it reflects considerations specific to patent issues.” *Mikohn Gaming Corp. v. Acres Gaming, Inc.*, 165 F.3d 891, 894 (Fed. Cir. 1998).

Claim construction is ultimately an issue of law, which we review *de novo*. *Shire Dev., LLC v. Watson Pharms., Inc.*, 787 F.3d 1359, 1364 (Fed. Cir. 2015). We review *de novo* the district court’s findings based on evidence “intrinsic to the patent,” which is all that is at issue here. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 841 (2015).

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Power Probe argues that the district court erred in holding that “continuity” is a parameter not capable of measurement. It asserts that the ’899 patent’s specification and the plain language of claims 10 and 12 teach that continuity is capable of measurement.

Innova responds that Power Probe forfeited its arguments because its argument on claim construction on appeal is inconsistent with its argument that there need not be any claim construction at the district court. On the merits, Innova asserts that the court did not construe “continuity” as a matter of law as “a parameter incapable of measurement,” but instead found as a matter of fact that “continuity is not capable of measurement as defined because it cannot be quantified.” Appellee’s Br. at 16. It adds that the court properly found that resistance can be measured, and from that measurement, continuity can be determined as either existing or not.

We disagree with Innova’s forfeiture argument. Innova accuses Power Probe of advancing inconsistent arguments as to the meaning of “continuity.” Specifically, Innova asserts that Power Probe argues at the district court that “continuity measurement” should be afforded its plain and ordinary meaning, but that Power Probe seeks a claim construction on appeal. Power Probe responds that its positions are consistent and that the plain and ordinary meaning of “continuity measurement” is determining the measured value associated with circuit continuity.

Power Probe is correct. Following the district court’s denial of its preliminary injunction motion, Power Probe filed a claim construction brief. In that brief, Power Probe argues that no construction is needed because the plain and ordinary meaning of “continuity measurement” is “determining a measured value associated with circuit continuity.” *Power Probe Grp., Inc. v. Innova Elecs. Corp.*, No. 21-cv-332, ECF No. 107 at 18–22 (D. Nev. Sept. 30, 2021). On appeal, Power Probe argues that the district court erred

in not applying the proper plain and ordinary meaning of “continuity measurement” because continuity is capable of measurement. *See, e.g.*, Appellant’s Br. at 42–43. Power Probe’s claim construction brief is not on the record before us because it was filed after the court denied Power Probe’s preliminary injunction motion. Thus, we need not entertain Innova’s forfeiture argument. However, even if we do consider Innova’s argument and take judicial notice of Power Probe’s brief,¹ we find that while Power Probe’s statements in its claim construction brief and on appeal are not verbatim identical, neither are they fundamentally inconsistent. For these reasons, we find that Power Probe has not forfeited its “continuity” arguments.

Turning to the merits, we also agree with Power Probe. As a matter of lexicography, the ’899 patent’s specification defines “parameters measurable by the electrical test device” as including “circuit continuity.” ’899 patent at col. 9 ll. 9–11. Furthermore, claim 10 specifies that one “parameter[] measurable by the test device” is “circuit continuity.” *Id.* at col. 12 ll. 22–23. Lastly, claim 12 requires “continuity measurement.” *Id.* at col. 12 ll. 53–54. These references show that the inventor used the term continuity as a measurable quantity. Although claim 3 recites “detecting continuity,” *id.* at col. 12 l. 2, the district court wrongly assumed that detecting continuity and measuring continuity are mutually exclusive.

This case is similar to *Trustees of Columbia University*, where we considered a situation where an independent claim of a patent was directed to “[a] method for detecting anomalous program executions.” *Trustees of Columbia Univ. in City of New York v. Symantec Corp.*, 811 F.3d 1359, 1369 (Fed. Cir. 2016). There, “[t]he district court

¹ We may take judicial notice of Power Probe’s claim construction brief in the district court pursuant to Rule 201(b)(2) of the Federal Rules of Evidence.

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construed ‘anomalous’ to mean ‘[d]eviation/deviating from a model of typical, attack-free computer system usage’ and later clarified that the model “only uses attack-free data.” *Id.* at 1369–70. However, on appeal, we recognized that “[t]he claims themselves show that the model can be built with both *attack-free* and *attack data*.” *Id.* at 1370 (emphasis added). That is, in *Trustees of Columbia University*, we recognized that some dependent claims further limited the claimed scope to “attack-free” data while other dependent claims limited the claim scope to “attack data.” We concluded that “because the dependent claims [in] patents are presumed to be narrower than the independent claims on which they depend, ‘anomalous’ cannot be read to limit the type of data used to model [] only attack-free data in the independent claims in the absence of other evidence rebutting the presumption.” *Id.* Similarly, here, the district court improperly construed independent claim 1 to exclude “continuity” limitations included in dependent claims 10 and 12 that describe “continuity” as measurable. Independent and dependent claims must if possible be interpreted to be consistent with each other, so continuity must be construed to be measurable. We thus hold that the court erred in construing “continuity” as a parameter that is not measurable.

CONCLUSION

We have considered Innova’s remaining arguments but find them unpersuasive. For the foregoing reasons, we *vacate* the district court’s decision denying a preliminary injunction and *remand* for further proceedings regarding whether Power Probe satisfied the requirements for a preliminary injunction.

VACATED AND REMANDED

COSTS

Costs are awarded to Power Probe.