

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

Eolas Technologies Incorporated,

Plaintiff,

vs.

Adobe Systems Inc., Amazon.com, Inc.,  
Apple Inc., Blockbuster Inc., CDW Corp.,  
Citigroup Inc., eBay Inc., Frito-Lay, Inc.,  
The Go Daddy Group, Inc., Google Inc.,  
J.C. Penney Company, Inc., JPMorgan  
Chase & Co., New Frontier Media, Inc.,  
Office Depot, Inc., Perot Systems Corp.,  
Playboy Enterprises International, Inc.,  
Rent-A-Center, Inc., Staples, Inc., Sun  
Microsystems Inc., Texas Instruments  
Inc., Yahoo! Inc., and YouTube, LLC

Defendants.

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Civil Action No. 6:09-cv-446

JURY TRIAL

PLAINTIFF’S RESPONSE TO DEFENDANTS’ MOTION FOR PARTIAL SUMMARY  
JUDGMENT OF INTERVENING RIGHTS (DKT. NO. 567)

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Eolas Technologies Inc. (“Eolas”) files this response in opposition to Defendants’ motion for partial summary judgment of intervening rights. Dkt. No. 567 (“D.Br.”). The motion should be denied, as it suffers from at least four critical flaws.

*First*, the motion does not even attempt to meet the requirements for summary judgment. Pursuant to those requirements, Defendants must demonstrate that there is no genuine issue as to any material fact that might preclude the entry of a judgment of intervening rights. But Defendants concede that their motion fails to address many of these genuine issues. D.Br. at 8. While Defendants suggest that they are in fact only seeking an order establishing one intervening-rights prerequisite, D.Br. at 8, such an order—which should not be issued in any event—could not possibly justify granting a summary judgment of intervening rights.

*Second*, the motion applies an incorrect and misleading legal standard. Defendants suggest that the controlling question is whether original and amended claims are “identical” for purposes of 35 U.S.C. § 252. D.Br. at 6. And Defendants leave no doubt regarding the significance they place on this word: “identical” is repeatedly quoted and highlighted throughout their brief. D.Br. at 1, 5-10. But in fact the statutory provision was amended in 1999, and the unqualified word “identical” was changed to “substantially identical”—which, significantly, merely reflected one of the Federal Circuit’s longstanding glosses on the statute.

*Third*, the motion erroneously argues that reexamination amendments substituting one synonymous phrase for another changed the scope of the original claims. D.Br. at 8-9. Defendants point out that, during the second reexamination of the ’906 patent, one phrase found in claims 1 and 6 was replaced by amendment with another similar-sounding phrase. D.Br. at 2-3, 8-9. Defendants fail to inform the Court, however, that the new, substituted phrase was taken word-for-word from a construction affirmed by the Federal Circuit as properly reflecting the true scope of claims 1 and 6. Ex. A at \*41; Ex. B at 1338; D.Br., Ex. G at 10. If the Federal Circuit was right about the scope of the ’906 patent’s claims, then Defendants cannot be right about the impact of these reexamination amendments.

*Fourth*, the motion erroneously argues that another reexamination amendment correcting a typographical error in an original claim changed the scope of that claim and one of its dependents. D.Br. at 9-10. The law holds, however, that such corrections do not effect substantive changes in claim scope, and will not give rise to any defense of intervening rights.

## **II. RESPONSE TO STATEMENT OF THE ISSUES TO BE DECIDED**

Because Defendants' statement of the issues is misleading, Eolas offers its own:

1. During the '906 patent's second reexamination, the patentee replaced certain original claim language with synonymous language taken from a construction held by the Federal Circuit to accurately reflect the scope of the original claims. Did those amendments effect a substantive change in the scope of those claims for purposes of 35 U.S.C. §§ 307(b) and 252? (No.)
2. During that same reexamination, the patentee made another amendment to correct a typographical error in one original claim. Did that amendment effect a substantive change in the scope of that claim for purposes of §§ 307(b) and 252? (No.)

## **III. RESPONSE TO STATEMENT OF MATERIAL FACTS**

Aside from its argumentative headings—with which Eolas disagrees—Eolas takes little issue with Defendants' statement of undisputed material facts 1-14, which largely describe the amendments made during the second reexamination of the '906 patent. D.Br. at 2-5. Defendants' statement misleads, however, by conspicuously omitting certain additional facts critical to the outcome of this motion. In particular, the statement fails to acknowledge that:

15. In an earlier litigation, Judge Zagel held that “[a]n executable application, as used in the '906 Patent, is any computer program code, that is not the operating system or a utility, that is launched to enable *an end-user to directly interact with data.*” Ex. A at \*41 (emphasis added).
16. In 2005, in an opinion authored by then-Judge (now-Chief Judge) Rader, the Federal Circuit affirmed this construction, holding that “the district court correctly gleaned the proper definition of the term from the intrinsic evidence including the patent claims and prosecution history.” Ex. B at 1338.

17. During the second reexamination of the '906 patent three years later, the patentee amended claims 1 and 6 of the '906 patent to reflect this affirmed construction, substituting the approved “enable *an end-user to directly interact with* said object” for the original “enable [interactive processing of] said object.” D.Br., Ex. G at 2, 5.

18. In doing so, the patentee explained to the examiner that “[t]his language is consistent with the claim construction set forth in the Markman ruling as affirmed by the Court of Appeals for the Federal Circuit and therefore this language does not change the scope of claims 1 and 6.” D.Br., Ex. G at 11.

#### **IV. ARGUMENT**

##### **A. This Motion Should Be Denied Because Defendants Have Not Even Attempted to Meet the Requirements for Summary Judgment.**

While styled as a motion for partial summary judgment of intervening rights, Defendants have in fact provided the Court with no basis to grant such a judgment. D.Br. at 8.

Summary judgment may be granted “when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *i2 Techs., Inc. v. Oracle Corp.*, No. 6:09-CV-194-LED, 2011 U.S. Dist. LEXIS 6053, at \*9 (E.D. Tex. Jan. 21, 2011). A fact issue will preclude summary judgment “if the evidence could lead a reasonable jury to find for the nonmoving party.” *Id.* And in determining whether such a genuine issue exists, “the court views all inferences drawn from the factual record in the light most favorable to the nonmoving party.” *Id.*

The doctrine of intervening rights, on the other hand, encompasses two distinct defenses: “absolute” and “equitable” intervening rights. *BIC Leisure Prods. v. Windsurfing Int’l*, 1 F.3d 1214, 1220 (Fed. Cir. 1993). The establishment of either defense requires the resolution of many factual issues, including, inter alia: which accused products were “made, purchased, or used” before the date on which the absolute rights were triggered; which products were undergoing “substantial preparations to make, use, or sell identical products” when the equitable rights are



deemed to begin; and whether the application of equitable rights is necessary and fair under the circumstances “for the protection of investments made or business commenced.” *See id.* at 1221.

Defendants concede that their motion addresses none of these factual issues. D.Br. at 8. Defendants therefore cannot meet—and frankly have not attempted to meet—the summary judgment standard. *i2 Techs.*, 2011 U.S. Dist. LEXIS 6053, at \*9. Essentially acknowledging this point, Defendants explain that they are “only seeking a legal determination that none of the asserted claims in the ’906 C2 reexamination certificate is legally ‘identical’ in scope to any claim in the original ’906 patent.” D.Br. at 8. As shown below, such a determination would be error. But even more fundamentally, such a determination would not support a judgment on intervening rights; it would simply show that a “prerequisite for invoking intervening rights does not bar [Defendants] from raising the defense.” *BIC Leisure*, 1 F.3d at 1220. Because that is not grounds for granting summary judgment, Defendants’ motion for such relief should be denied.

**B. This Motion Should Be Denied Because the ’906 Patent Was Not Substantively Changed in Reexamination.**

Defendants’ request for a legal determination that the ’906 patent’s reexamined claims are no longer “identical” to its original claims, D.Br. at 8, is also without merit and should be denied. Defendants make three arguments in support of this request, all of which are misguided. *First*, Defendants argue that the controlling standard asks whether the new and old claims are “identical,” or “identical in scope.” D.Br. at 5-8. The controlling standard, however, asks whether the new and old claims are “substantially identical,” or “without substantive change in scope.” *Second*, Defendants argue that reexamination amendments substituting synonymous terms changed the scope of the asserted claims. D.Br. at 8-9. But as the patentee explained to the examiner, the substituted phrase was taken from a claim construction affirmed by the Federal Circuit. As a matter of law—indeed, by definition—substituting that approved construction effected no change in claim scope. *Third*, Defendants argue that a reexamination amendment correcting a typographical error changed the scope of two asserted claims. D.Br. at 9-10. Again, however, the law holds that such corrections do not effect substantive changes in claim scope.

**1. The controlling standard asks whether the reexamination amendments effected substantive changes in claim scope.**

Defendants clearly believe that the word “identical” is central to their motion. It is repeatedly quoted and highlighted—often emboldened and italicized—throughout their brief. D.Br. at 1, 5-10. Defendants take that word, however, from a decade-old version of a statute that was amended in 1999. D.Br. at 6 n.2. And in fact their heavy emphasis on that unqualified word is seriously misleading.

The statutory provisions controlling the intervening-rights issues raised by Defendants are found at 35 U.S.C. §§ 252 & 307(b). In particular, § 307(b) provides that “[a]ny proposed or amended new claim determined to be patentable and incorporated into a patent following a reexamination proceeding will have the same effect as that specified in section 252 of this title for reissued patents.” *Id.* § 307(b). And § 252 in turn provides, in relevant part, that

the surrender of the original patent shall take effect upon the issue of the reissued [or reexamined] patent . . . , but in so far as the claims of the original and reissued [or reexamined] patent are *substantially identical*, such surrender shall not affect any action then pending nor abate any cause of action then existing, and the reissued [or reexamined] patent, to the extent that its claims are *substantially identical* with the original patent, shall constitute a continuation thereof and have effect continuously from the date of the original patent.

*Id.* § 252 (emphasis added). The statutory question, therefore, is not whether the original and amended claims are “identical,” but whether they are “substantially identical.”

Defendants concede in a footnote that the “substantially” modifier was added to § 252 by a 1999 amendment that went into effect in 2000. D.Br. at 6 n.2. But they nevertheless argue that the pre-2000 version of the statute should apply to the ’906 C2 certificate that was issued in 2008. D.Br. at 6 n.2. This argument makes little sense—after all, the provision relevant to reexamination certificates is § 307(b), and there is no reason to think that it would intentionally point to an out-of-date version of § 252.<sup>1</sup> More importantly, however, the law was clear long

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<sup>1</sup> Indeed, one of Defendants’ own cases applies the new version of § 252 to a patent that was filed before, but reissued after, the 1999 amendment. *See Aspex Eyewear, Inc. v. E’Lite Optik, Inc.*, 552 F. Supp. 2d 620, 623 (N.D. Tex. 2008). And Defendants cite no case indicating that the 1999 version of the statute should apply to 2008 reexamination amendments. D.Br. at 7.

before the 1999 amendment that, in this context, “identical” in fact meant “substantially identical.” Indeed, that was the very reason for amending the statute.<sup>2</sup>

In other words, even the out-of-date version of the statute upon which Defendants’ base their motion was *never* interpreted as requiring that original and amended claims be literally “identical.” Instead, that word was understood to mean, “at most, without substantive change.” *Slimfold Mfg. Co. v. Kinkead Industries, Inc.*, 810 F.2d 1113, 1115 (Fed. Cir. 1987); *Seattle Box Co. v. Indus. Crating & Packing, Inc.*, 731 F.2d 818, 827-28 (Fed. Cir. 1984). In short, the controlling standard—under both the old and new versions of § 252—is “whether a particular change to the claims is substantive, such that the scope of the claims is no longer substantially identical. It is a reasonable standard, for it implements the purpose of the statute while enabling application ‘to the facts in any case that justice will be done.’” *Laitram Corp. v. NEC Corp.*, 952 F.2d 1357, 1361 (Fed. Cir. 1991) (“*Laitram I*”). And under that reasonable standard, doing justice in this case requires finding that the ’906 C2 reexamination certificate effected no substantive change in the scope of any asserted claim.

**2. The amendments substituting language from the Federal Circuit’s construction effected no substantive change in claim scope.**

Defendants’ principal argument is that the reexamination amendments replacing the original phrase “enable [interactive processing of] said object” with the new phrase “enable *an end-user to directly interact with* said object” changed the scope of the ’906 patent’s claims 1 and 6. D.Br. at 8-9. But as noted above, the patentee took this new language word-for-word from a construction of these claims affirmed by the Federal Circuit. Ex. A at \*41; Ex. B at 1338; D.Br., Ex. G at 2, 5, 11. And as a matter of law—indeed, by definition—substituting language

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<sup>2</sup> “In section 252 of title 35, the term ‘identical’ has, heretofore, been used without qualification, but the courts have interpreted that term to encompass claims that are ‘substantially identical.’ That standard . . . has now been explicitly codified in section 252 of title 35 by a conforming amendment. No change in the law of intervening rights is intended by that conforming amendment.” H.R. Rep. 105-39, at 62 (1997); *see also Safoco, Inc. v. Cameron Int’l Corp.*, No. 4:05-CV-739, 2009 U.S. Dist. LEXIS 128755, at \*23 n.32 (S.D. Tex. Apr. 8, 2009).

from the construction affirmed as the “proper definition” of a claim term could not have changed the scope of the claims containing that term. Ex. B at 1338; *see also Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (noting that claim construction involves “ascertain[ing] the proper scope of [the] claims”). In short, if the Federal Circuit was right about the scope of the claims in the ’906 patent, then Defendants are wrong about the impact of these reexamination amendments. Ex. B at 1338; D.Br. at 8-9. Substituting one synonymous phrase for another during reexamination does not effect any substantive change in claim scope, and it did not give rise to any intervening rights in this case. *See Bloom Eng’g Co. v. North Am. Mfg. Co.*, 129 F.3d 1247, 1250 (Fed. Cir. 1997); *Tennant Co. v. Hako Minuteman, Inc.*, 878 F.2d 1413, 1417 (Fed. Cir. 1989); *Kaufman Co. v. Lantech, Inc.*, 807 F.2d 970, 977 (Fed. Cir. 1986); *Key Mfg. Group, Inc. v. Microdot, Inc.*, 679 F. Supp. 648, 663 (E.D. Mich. 1987).

Defendants focus their meritless argument to the contrary on a suggested “presumption” that a claim amended to overcome prior art is no longer “identical” to the original claim for purposes of § 252. D.Br. at 8-9. In fact this rule was proposed to the Federal Circuit, and the Federal Circuit rejected it—

We thus answer the certified question as follows: When claims are amended during reexamination following a rejection based on prior art, the claims are not deemed substantively changed as a matter of law. There is no per se rule. To determine whether a claim change is substantive it is necessary to analyze the claims of the original and the reexamined patents in light of the particular facts, including the prior art, the prosecution history, other claims, and any other pertinent information.

*Laitram I*, 952 F.2d at 1362-63. In other words, there is no presumption that any amendment substantively changes claim scope; to determine whether that happened a claim-construction analysis is necessary. *See id.* Defendants’ motion offers no such analysis. D.Br. at 8-9. And considering that these claims have already been construed—and the original and amended phrases found to be synonymous—that is perhaps not surprising. Ex. A; Ex. B.

Defendants’ citations to the *Warner-Jenkinson* and *Festo* cases are also unavailing. D.Br. at 9; *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 33-34 (1997); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 734 (2002). Neither of those cases

involved § 252, and neither supports application of any kind of substantive-change presumption in this case. In *Warner-Jenkinson*, the Court’s discussion of a possible presumption regarding “reason[s] related to patentability” was explicitly limited to the situation in which a patentee provides “no explanation” for an amendment. 520 U.S. at 33. In this case, of course, the patentee provided an explanation for the amendment, and confirmed that it did “not change the scope” of the claims. D.Br., Ex. G at 11. And in *Festo* the Court recognized—in the paragraph immediately preceding the one Defendants quote—that “by the amendment [the patentee] recognized and emphasized the difference between the phrases.” 535 U.S. at 734; D.Br. at 9. In this case, of course, the patentee recognized and emphasized the Federal-Circuit-affirmed equivalence between the phrases. D.Br., Ex. G at 11.<sup>3</sup>

**3. The amendment correcting a typographical error effected no substantive change in claim scope.**

Defendants also briefly argue that an amendment made to correct a typographical error effected a substantive change in claim scope for claims 13 and 14 of the ’906 C2 patent. D.Br. at 9-10. They are incorrect. As explained in their statement of undisputed material facts, “a typographical error . . . occurred when the method claim 4 was being converted to the computer program product claim 9.” D.Br. at 5. In the original method claim 4, the first phrase of the preamble referenced an interactively controlling step, and the second phrase of the preamble linked back to that “said step of interactively controlling.” D.Br., Ex. G at 2-3. When that claim

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<sup>3</sup> Defendants’ other entirely conclusory arguments are also meritless. For example, Defendants suggest that Eolas’ agreement to different constructions for the old and new phrases “confirms that they are not ‘identical’ as a matter of law.” D.Br. at 8. This is a non sequitur, as it is a fundamental principle of claim construction that different words can have equivalent meanings. And in this case, all four of those phrases are synonymous. D.Br., Ex. J at 3. Defendants also suggest that the new phrase is narrower than the old because the new phrase contains the words “user” and “directly.” D.Br. at 8. But Defendants’ own construction for both of these phrases contains the word “user,” D.Br., Ex. J at 3—so that cannot provide any basis for distinguishing the phrases. And in the context of this patent, “interactive processing of said object” is simply synonymous with “directly interact[ing] with said object.” Ex. A at \*41; Ex. B at 1338; D.Br., Ex. A at 6:40-47, 6:63-7:1, 8:16-26, 8:47-50, 9:66-10:4, 12:3-5, 15:58-64; D.Br., Ex. G at 11.

was converted to claim 9, the first phrase of the preamble was changed to reference the relevant computer readable program code, but the second phrase—inadvertently—was not changed to link back to the first. D.Br., Ex. G at 6-10. During the second reexamination, that typographical error was corrected, so that the second phrase of claim 9’s preamble now links back to the previously described “said computer readable program code for causing said client workstation to interactively control . . . .” D.Br., Ex. G at 7, 10. This correction is relevant to claims 13 and 14 because claim 13 is identical to the original claim 9 (as corrected), and claim 14 is identical to the original claim 10, which depended from claim 9. D.Br., Ex. G at 6-10.

The question, in short, is whether the amendment correcting this typographical error effected a substantive change in claim scope under § 252. The law says no. In fact, a sister statute explicitly provides that typographical and other similar errors may be corrected without fear of triggering intervening rights. *See* 35 U.S.C. § 255 (“Certificate of correction of applicant’s mistake”). Defendants suggest that the rule could be different here because, prior to the correcting amendment, the error might have rendered the original claims 9 and 10 indefinite. D.Br. at 9-10. But a similar argument was asserted in the *Slimfold* case, and the Federal Circuit rejected it. *See Slimfold Mfg.*, 810 F.2d at 1116-17. The defendant in *Slimfold* argued that an amendment made to correct a definiteness problem should be considered to have effected a substantive change in claim scope, and that “it was entitled to rely on th[e] defect” in the original claim. *Id.* at 1117. The Federal Circuit disagreed, noting that the “amendment did not enlarge the scope of the claims, and [the defendant] did not demonstrate that it relied to its detriment on any aspect of the original claims that was changed.” *Id.* The court further explained that § 252 was in fact “a remedial statute having as its sole purpose the correction of errors,” and that its application in this manner properly “reflect[ed] the continuing efforts of courts to reach a just result.” *Id.*; *see also Bloom Eng’g*, 129 F.3d at 1250 (noting that amendments making claims more definite are “generally viewed as identical for the purpose of § 252”).

The Federal Circuit’s analysis in *Slimfold* should control this Court’s analysis of the error-correction amendment in this case: the amendment did not change the claim’s scope;

Defendants did not rely to their detriment on the original version of the claim; and a just result can be reached by finding that the correction did not trigger intervening rights under § 252.

**V. CONCLUSION**

For the foregoing reasons, Eolas respectfully requests that the Court deny Defendants' motion for partial summary judgment of intervening rights in its entirety. Dkt. No. 567.

Dated: February 18, 2010.

**McKool Smith, P.C.**

/s/ Mike McKool

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**CERTIFICATE OF SERVICE**

The undersigned certifies that true and correct copies of the foregoing document were served to all counsel of record via the Court's ECF system.

/s/ Josh Budwin  
Josh Budwin