

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

ANASCAPE, LTD.

Plaintiff,

v.

MICROSOFT CORPORATION, and
NINTENDO OF AMERICA, INC.,

Defendants.

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Hon. Ron Clark

Civil Action No. 9:06-CV-00158-RC

Oral Argument Requested

**MICROSOFT CORPORATION'S MOTION FOR
PARTIAL SUMMARY JUDGMENT –NONINFRINGEMENT OF PSVC CLAIMS**

MICROSOFT CORPORATION'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT–NONINFRINGEMENT OF PSVC CLAIMS

SUMMARY

The Court’s Claim Construction requires: (1) that every asserted claim in the ‘084, ‘802, ‘886, and ‘991 patents, along with nine asserted claims of the ‘525, and ‘700 patents,¹ include the limitation “pressure-sensitive variable-conductance material” (“PSVC Claims”); and (2) that “pressure-sensitive variable-conductance material” has the property that the conductivity of the material itself changes with pressure. Anascape’s case for the PSVC Claims hinges on its assertion that Microsoft’s Xbox controllers (the “Accused Products”) have pressure-sensitive variable-conductance material. Anascape has no evidence to support this allegation. Indeed, this motion is supported by affirmative evidence that the Accused Products do not have pressure-sensitive variable-conductance material.

Accordingly, the Accused Products cannot be found to infringe because they lack at least one element of every one of the PSVC Claims. The Court should grant partial summary judgment of noninfringement of the PSVC Claims.

UNDISPUTED MATERIAL FACTS

(1) Each accused product contains a force sensing resistor device having FSR material. (Declaration of Andrew Tesnakis (“Tesnakis Decl.”), Ex. 2, pp. 10-12.)²

(2) Anascape accuses the FSR material of being pressure-sensitive variable-conductance material. (Tesnakis Decl., Ex. 2, pp. 10-12.)

¹ The ‘084, ‘802, ‘886, ‘991, ‘525, and ‘700 patents refer to U.S. Pat. Nos. 5,999,084, 6,102,802, 6,135,886, 6,343,991, 6,222,525, and 6,906,700 respectively.

² Anascape duplicates the same infringement allegations for each PSVC Claim. Ex. 2 of the Tesnakis Declaration is a representative of Anascape’s Patent Rule 3-1 infringement allegations for each PSVC Claim.

(3) The FSR material does not have the property that its conductivity changes with pressure. (Declaration of Stuart Yaniger (“Yaniger Decl.”), ¶¶7-13.)

ISSUES PRESENTED

- (1) Whether the Accused Products literally infringe any PSVC Claim.
- (2) Whether the Accused Products infringe any PSVC Claim under the doctrine of equivalents.

ARGUMENT

I. ANASCAPE’S ASSERTED CLAIMS

A. Seventy-Seven Asserted Claims Construed to Have PSVC Material

Anascape asserts that Microsoft products infringe sixty-eight (68) claims of the ‘084, ‘802, ‘886, and ‘991 patents.³ Twenty-three (23) of these claims explicitly include a limitation for “pressure-sensitive variable-conductance material.”⁴ Each of the remaining forty-five (45) asserted claims in these four patents has been construed by the Court to require the element “pressure-sensitive variable-conductance material.”⁵ Accordingly, each of the sixty-eight (68) asserted claims in the ‘084, ‘802, ‘866, and ‘991 patents requires “pressure-sensitive variable-

³ Anascape asserts the following sixty-eight (68) claims: ‘084 patent—claims 5, 6, and 11; ‘802 patent—claims 1-18; ‘886 patent—claim 7; ‘991 patent—claims 1, 3, 6-8, 11, 12, 16-19, 23-25, 28-37, 40-53, and 66-73. (Tesnakis Decl., Ex. 1 at 1.)

⁴ The following twenty-three (23) asserted claims explicitly include the pressure-sensitive variable-conductance material limitation because they contain, or depend on a claim, that contains that term: ‘084 patent—claims 5, 6, 11; ‘802 patent—claims 1-4, 7, 8, 10; ‘886 patent—claim 7; and ‘991 patent—claims 12, 16-19, 29, 31, 32, 50-53. (Claim Construction Order (Dkt. No. 159), at 7; Original Complaint (Dkt. No. 1), Exs. A, B, C, and F.)

⁵ The following forty-five (45) asserted claims are construed to require pressure-sensitive variable-conductance material based on one or more of the Court’s claim constructions: ‘802 patent—claims 5, 6, 9, and 11-18; ‘991 patent—claims 1, 3, 6-8, 11, 23-25, 28, 30, 33-37, 40-49, and 66-73. (Claim Construction Order (Dkt. No. 159); Order on Agreed Terms (Dkt. 160).)

conductance material.”

The Claim Construction Order also applies to nine (9) asserted claims of the ‘525 and ‘700 patents.⁶ Each of these nine (9) claims is also construed to include the element “pressure-sensitive variable-conductance material.” (Claim Construction Order at 11-18.) Accordingly, a total of seventy-seven (77) PSVC Claims in the asserted patents (not subject to the Court’s stay) have been construed by the Court to include the limitation “pressure-sensitive variable-conductance material.”

As a matter of law, a device that does not have “pressure-sensitive variable-conductance material” could not literally infringe any PSVC Claim. *See, e.g., PC Connector Solutions LLC v. Smartdisk Corp.*, 406 F.3d 1359, 1364 (Fed. Cir. 2005) (“Summary judgment on the issue of infringement is proper when no reasonable jury could find that every limitation recited in a properly construed claim either is or is not found in the accused device either literally or under the doctrine of equivalents.”)

B. PSVC Material Must Have A Specific Property

The Court has construed “pressure-sensitive variable-conductance material” (“PSVC material”) to mean “a substance that changes in conductivity to allow a greater flow of electric current through it as pressure is applied to it.” (Claim Construction Order at 7-11.)

In its construction, the Court made clear that the “pressure-sensitive variable-conductance material” is not a device, like a transistor, sensor, or relay; instead, it is a “substance or compound.” *Id.* at 8. The Court further noted that just because a sensor or circuit as a whole

⁶ The following nine (9) asserted claims in the ‘525 and ‘700 patents are construed to require “pressure-sensitive variable-conductance material”: ‘525 patent—claims 1, 6, and 18; ‘700 patent—claims 6-11.

might function to increase conductivity in response to pressure, is not enough to meet the requirement that there be “pressure-sensitive variable-conductance material”:

Of course, simply because a greater flow of current can be achieved between two electrical contacts by increasing pressure on them, or increasing the surface area of contact, does not mean either contact is made of a PSVC material. ... PSVC material, as described in the claims and specification, and as known to those skilled in the art, must itself change in conductivity as a result of pressure, even though in certain applications increasing the surface area of contact may also increase the flow of current.

Id. at 10-11. Microsoft is entitled to summary judgment of noninfringement of the PSVC Claims because the Accused Products do not have a material with the property that its conductivity will change as a function of pressure. *PC Connector*, 406 F.3d at 1364.

II. NO EVIDENCE OF LITERAL INFRINGEMENT

A. Anascope Alleges That FSR Material is PSVC Material

In its Rule 3-1 infringement contentions, Anascope alleges that a substance under the four control buttons on the right-hand side of the Accused Products is pressure-sensitive variable-conductance material. (Teskakis Decl. Ex. 2 at 11.) Specifically, Anascope alleges that this black film known as FSR material, which is made and supplied by Interlink Corporation, is PSVC material. (*Id.* at 12.) But Anascope has no evidence that the FSR material in the Xbox controllers has the properties of PSVC material. Indeed, the conductivity of the FSR material in Microsoft’s controllers remains constant as a function of pressure.

B. FSR Material Does Not Have the Properties of PSVC Material

The FSR *device*, which is a type of pressure sensor having a particular FSR *material* as one component, was invented at Interlink. (Yaniger Decl. ¶ 4.) An FSR device consists of FSR material, a base ply, electrical contacts, and a conductor support ply. (*Id.* at ¶ 5.) While the conductivity of the FSR *device* or sensor as a whole varies with pressure, the conductivity of the

FSR *material* does not change with pressure. (*Id.* at ¶¶ 6-7.) This distinction is critical.

FSR material has semi-conductive particles embedded in a resin that is saturated with conductive particles, making the resin semi-conductive to electricity. (*Id.* at ¶ 8.) The semi-conductive particles embedded in the semi-conductive resin form microprotrusions on the surface of the FSR material. (*Id.*)

An FSR device works on the principle that the greater the number of micro-protrusions that touch the electrical contacts, the greater the electrical conductivity of the FSR device. Under increasing pressure, the flexible base layer of the FSR device non-compressively deforms to allow more micro-protrusions of the FSR material to touch the electrical contacts, causing the conductance through the FSR device to increase with pressure while the conductivity of the FSR material remains constant. (*Id.* at ¶ 6; *see also* Microsoft's Technology Tutorial.)

While an FSR device as a whole has a resistance that varies with pressure, that change in resistance is caused entirely by increasing the number of points of contact between the FSR material's semi-conductive particles and the conductive traces; the conductivity of the FSR material itself does not change with pressure. (Yaniger Decl. ¶ 7.) Indeed, the FSR material was purposefully designed not to change conductivity as a function of pressure because of the undesirable characteristics of materials that do have a conductivity that changes with pressure. (Yaniger Decl. ¶ 9.) A simple test confirms that the resistance of the FSR material remains constant with changes in pressure. (*Id.* at ¶¶ 10-14.) Accordingly, the FSR material in the Accused Products is not PSVC Material. Anascape has no evidence to show that FSR material is pressure-sensitive variable-conductance material.

Anascape's infringement contentions and responses to discovery requests fail to cite to any specific evidence to show that FSR material has the property that its conductivity changes as

a function of pressure. (*See, e.g.*, Tesnakis Decl., Ex. 2 at 11-12.) Significantly, it has failed to perform any test in an attempt to prove its case. Rather, Anascape vaguely refers to a laundry list of items, including a few depositions, that supposedly make its case. (*See, e.g., id.*) However, those references merely state that the overall FSR *device* will change conductivity as a function of pressure—not that FSR *material* changes conductivity as a function of pressure. There is no evidence that FSR material has the property that its conductivity changes as a function of pressure; therefore there is no genuine issue of disputed fact as to the lack of literal infringement.

III. NO EVIDENCE OF DOCTRINE OF EQUIVALENTS INFRINGEMENT

A. No Evidence of Function—Way—Result Test

To show infringement under the doctrine of equivalents for a particular claim element, Anascape must show that the substitute element in the accused product performs substantially the same **function**, in substantially the same **way**, with substantially the same **result**. *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 39-40 (1997) (emphasis added). In its infringement contentions and discovery responses, Anascape again attempts to obfuscate the distinction between a pressure sensor device as a whole and the specific conductive material used in the device. In particular, Anascape fails to apply the function/way/result test to the claim element—PSVC material—as required in a doctrine of equivalents analysis. *Id.*

Anascape describes the function at issue as “creating an analog response that varies in response to applied pressure.” (Tesnakis Decl., Ex. 2 at 12.) That is the function of a pressure sensor device, requiring electrical contacts and wires, among other things. It is not the function of the PSVC material claim element. The function of the PSVC material claim element is to change conductivity with pressure. (Claim Construction Order at 11.) FSR material does not perform the function of changing conductivity with pressure. (Yaniger Decl. ¶¶ 7-14.)

Similarly FSR does not perform in the same way as PSVC material. The conductive particles internal to the PSVC material are forced closer together by pressure, resulting in a change in conductivity. (Claim Construction Order, p. 9.) Anascape does not allege that FSR material performs by having internal particles being forced closer together. (Tesnakis Decl., Ex. 2 at 12.)

The result is also different. When pressure is applied to PSVC material, its conductivity changes. Apply pressure to FSR material and its conductivity does not change. (Yaniger Decl. ¶¶ 7-14.) In short, FSR material performs a different function, in a different way, with a different result. Summary judgment of noninfringement of the PSVC claims under the doctrine of equivalents is appropriate.

B. Failure to Provide Particularized Evidence and Linking Argument

To avoid summary judgment on the doctrine of equivalents, a patentee must provide “particularized evidence and linking argument as to the ‘insubstantiality of the differences’ between the claimed invention and the accused device, or with respect to the ‘function, way, result’ test” *PC Connector*, 406 F.3d at 1364. If the patentee “present[s] the district court with only conclusory statements regarding equivalence,” summary judgment of no infringement under the doctrine of equivalents should be granted. *Id.* For example, in *Network Commerce, Inc. v. Microsoft Corp.*, 422 F.3d 1353, 1363 (Fed. Cir. 2005), the Federal Circuit affirmed a grant of summary judgment because “[t]he expert declaration and other evidence relied on by Network Commerce supporting infringement by equivalents [were] generalized and d[id] not provide particularized testimony and linking argument on a limitation-by-limitation basis.”

Anascape’s evidence of equivalence amounts to a single sentence that fails to state particularized evidence and linking argument as to the insubstantiality of the differences.

(Tesnakis Decl., Ex. 2 at 12) (“The ‘FSR Material’ of the Accused Instrumentalities is equivalent to ‘pressure-sensitive variable conductance material’ because it performs substantially the same function -- creating an analog response that varies in response to applied pressure -- in substantially the same way -- by rearranging conductive elements in order to increase the number of conductive paths (as confirmed by the detailed descriptions of the Yaniger and Mitchell patents and the Asserted Patents) -- to yield substantially the same result -- an analog output that varies in response to applied pressure.”). Such a conclusory assertion is insufficient to survive summary judgment on the doctrine of equivalents.

Accordingly, summary judgment of noninfringement under the doctrine of equivalents should be granted. *See PC Connector*, 406 F.3d at 1364.

C. Violation of the All Elements Rule

Application of the doctrine of equivalents is also unavailable as a matter of law in this case because it violates the “all elements” rule. “[T]he doctrine of equivalents is not a license to ignore or ‘erase . . . structural and functional limitations of the claim,’ limitations ‘on which the public is entitled to rely in avoiding infringement.’” *Athletic Alternatives, Inc. v. Prince Mfg.*, 73 F.3d 1573, 1582 (Fed. Cir. 1996); *Conopco, Inc. v. May Dep’t Stores Co.*, 46 F.3d 1556, 1562 (Fed. Cir. 1994) (“The doctrine of equivalents cannot be used to erase ‘meaningful structural and functional limitations of the claim on which the public is entitled to rely in avoiding infringement.’”). As the Supreme Court has explained, “[i]t is important to ensure that the application of the doctrine, even as to an individual element, is not allowed such broad play as to effectively eliminate that element in its entirety.” *Warner-Jenkinson*, 520 U.S. at 29.

Here, the public is entitled to rely on the description of the invention as utilizing pressure-sensitive variable-conductance material. *See, e.g., Sage Prods., Inc. v. Devon Indus., Inc.*, 126

F.3d 1420, 1425 (Fed. Cir. 1997) (finding no equivalence as a matter of law: “Because this issued patent contains clear structural limitations, the public has a right to rely on those limits in conducting its business activities.”). In this case, the public could not read the patents and conclude that the patentee was claiming sensors without PSVC material. (Claim Construction Order at 17.) Thus, as a matter of law, the doctrine of equivalents cannot serve to ignore the PSVC limitation. *See PC Connector Solutions LLC v. Smartdisk Corp.*, 406 F.3d 1359, 1365 (Fed. Cir. 2005); *Searfoss v. Pioneer Consolidated Corp.*, 374 F.3d 1142, 1151 (Fed. Cir. 2004) (cannot ignore claim construction requiring a “direct” connection to find that “indirect” connection infringes under the doctrine of equivalents).

D. Violation of the Disclosure-Dedication Rule

The “disclosure-dedication” rule also prohibits the application of the doctrine of equivalents here, as a matter of law. *See Johnson & Johnston Assoc. v. R.E. Service Co.*, 285 F.3d 1046 (Fed. Cir. 2002) (*en banc*). Anascape has argued strenuously that the specification discloses a surface area embodiment, independent of PSVC material, for creating variable output. Microsoft disagrees, but even if true, Anascape cannot identify a single claim in the asserted patents that is directed to a variable output sensor without the presence of PSVC material. The failure to claim an embodiment that relies solely on the surface area affect to generate a variable output, dedicates that subject matter to the public. *See id.* at 1054-55. Having allegedly disclosed a sensor operating solely on the surface area effect, without claiming such a sensor, Anascape cannot now invoke the doctrine of equivalents to extend the scope of its claims to cover devices that work solely on the surface area effect. *See id.* at 1055. To do so would trample on the public’s undoubted right to use what is disclosed but not specifically claimed in a patent. *See id.* at 1053.

CONCLUSION

For the foregoing reasons, the Court should grant partial summary judgment that none of the 77 PSVC Claims is infringed by the Accused Products either literally or under the doctrine of equivalents.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 26th day of December, 2007, the foregoing pleading was electronically filed with the Court. Pursuant to Local Rule CV-5(a)(3), this constitutes service on the following counsel:

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