

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 REPLY IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT—NONINFRINGEMENT OF PSVC CLAIMS**

I. INTRODUCTION

Anascape admitted to the Court that “[u]nder the reasoning of the court's opinion, we don't have a literal infringement case.” (Tr. 12/11/07 Conf. at 25:24-26:1.) There is no gap between the Court’s reasoning and its claim construction. Moreover, Anascape has failed to come forward with any evidence that the FSR material itself changes in conductivity as a result of pressure. It admits as much by admitting that the FSR material does not have a volume effect. There is no genuine issue of disputed fact on the lack of literal infringement.

For the doctrine of equivalents, Anascape offers only two conclusory sentences that fail to show that FSR material works in the same way as PSVC material. The Court has already decided that the public could not read the patents and conclude that the patentee was claiming sensors without PSVC material. That is dispositive. As a matter of law, the doctrine of equivalents cannot eliminate the PSVC material limitation on which the public is entitled to rely.

II. ARGUMENT

A. Anascape Conflates PSVC Material With PSVC Sensor

There is no dispute on how the FSR sensors in Microsoft products work. Both parties describe the same thing. However, Anascape avoids addressing the physical conductivity of the FSR material itself. Instead, Anascape conflates the conductivity of an FSR device with the conductivity of the FSR material. Anascape even asserts that the difference between the conductivity of the sensor and the material is not clear-cut. (Resp. at 8.) Nonsense. The Court clearly described the difference between a device and a material. *See* Markman Order at 8.

Anascape’s response focuses on the properties of a device, not the material. For instance, on page 6 of its brief, Anascape states, “As the actuator is pressed harder against the back side of the material, more tin oxide particles contact the traces, increasing the number of paths for

electricity to move, *decreasing the resistance of the FSR Material.*” (emphasis added.) The underlined text is a description of the property of a device—not FSR material by itself. The italicized text does not follow from the underlined text, and is unsupported by any evidence. Having more tin oxide contact the traces is not a change in resistance of the FSR material itself. Of course, a change in surface area of contact changes the flow of electricity through the FSR device. That is the point of the FSR device. But, the change in electricity flow as a function of pressure is not caused by a change in conductivity of FSR material itself. (Yaniger Decl. at ¶¶ 13-14.)¹

Anascape fails to provide any evidence that the FSR material meets the Court’s claim construction for PSVC material: “Pressure-sensitive variable conductance material” means: “a substance that changes in conductivity to allow a greater flow of electrical current through it, as pressure is applied to it.” (CC Order at 11.) There is no evidence that the “substance” (FSR material) changes conductivity to allow a greater electrical flow.

Like the loose battery cable, tightening the clamp reduces resistance by increasing the contact area between the clamp and the battery terminal. Tightening the clamp does nothing to the conductivity of the material that makes up the clamp. Just as the clamp is not made of “a substance that changes conductivity to allow a greater flow of electric current through it as pressure is applied,” the FSR material is not “a substance that changes conductivity to allow a greater flow of electric current through it as pressure is applied.”

¹ For the first time Anascape alleges that the polysulfone plastic film, on which the FSR ink is painted, is part of the FSR material. Paint is a material. When one talks about the paint on the wall in one’s house, one is not talking about the paint and the sheet rock together. Nonetheless, in this case, Anascape’s new allegation does not make a difference. Yaniger’s test proves that the combination of the FSR material painted on the polysulfone film does not change conductivity with pressure. (Yaniger Decl. at 13-14.)

Even Anascape understands that it loses under the reasoning of the Court’s opinion. (Resp. at 9.) There is no gap between the Court’s claim construction and the Court’s reasoning. Anascape has failed to meet its burden of producing evidence to preclude summary judgment.

B. The Court Should Reject Anascape’s Attempt To Reargue The Construction Of Claims 66-69

Whether a term in a preamble should be construed and have patentable weight is a matter of claim construction. *See, e.g., Catalina Marketing Int’l v. Coosavings.com*, 289 F.3d 801, 808 (Fed. Cir. 2002). Anascape knows how to argue in claim construction that a claim term in the preamble should not be a limitation. (Pl. CC Br.–II (Dkt. 89) at 16.) In this instance, Anascape affirmatively represented that the PSVC Sensor terms in every ‘991 patent claim should be construed the same (Pl. CC Br.–I (Dkt. 88) at 10 n.3) which the Court acknowledged (CC Order at 11 n.7). Anascape also failed to single out claims 66-69 as an exception when it admitted that “[u]nder the reasoning of the court’s opinion, we don’t have a literal infringement case.” (Tr. 12/11/07 Conf. at 25:24-26:1.) The Court should reject Anascape’s new argument.

Anascape again pretends that the ‘991 patent discloses separate volume effect and surface area effect embodiments despite having admitted that the ‘991 patent did not have a single embodiment without PSVC material. (Tr. 8/22/07 Hrg. at 35:7-36:16.) The Court has already concluded otherwise. (*See* CC Order at 17) (one of ordinary skill could not conclude that the patentee was claiming sensors without PSVC material.)

Similarly, the opportunity to argue that claim 66 is a surface area-only embodiment is past. When asked by the Court to give it “your best shot” at identifying a claim without PSVC material, Anascape failed to identify claim 66. (*Id.* at 47:2-48:21.)

The preamble term “pressure-sensitive variable-conductance sensor” is a limitation in the claim because “it states a necessary and defining aspect of the invention.” *See On Demand*

Machine Corp. v. Ingram Industries, 442 F.3d 1331, 1343 (Fed. Cir. 2006). It is also a necessary limitation because it forms the antecedent basis for the term “said sensor” in claim 66. *See NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282, 1306 (Fed. Cir. 2005).

There is no dispute as how the products work. The claims have been construed. Summary judgment of no literal infringement is appropriate. *See Athletic Alternatives, Inc. v. Prince Manuf.*, 73 F.3d 1573, 1578 (Fed. Cir. 1996)

C. FSR Material Works In A Different Way Than PSVC Material

PSVC material is the element for which Anascape asserts the doctrine of equivalents. Anascape agrees that the analysis should be limited to the limitation and not of the invention as a whole. (Resp. at 12-13.) When the element, PSVC material, is divorced from the sensor, the evidence is that the FSR material performs a different function, in a different way, with a different result. (*See* Mot. at 6-7.) Anascape’s own brief demonstrates that it works in a different way.

Anascape explains that the FSR material works through a “micro” surface area effect. (Resp. at 5.) In contrast, the way that PSVC material works is that the conductivity of the material itself changes with pressure. (CC Order at 11.) These mechanisms are so different that they are separate embodiments that can be claimed separately. (Resp. at 9-10.) Anascape’s own argument establishes that PSVC and FSR material work in a fundamentally different way.

Microsoft’s test measured the resistance of the FSR material, as acknowledged by Dr. Wright. (Wright Decl. ¶ 17.) Dr. Wright does not criticize the test or results as being inaccurate. Rather, he criticizes it for “not accurately model[ing] the Xbox Accused Products,” highlighting the fatal flaw in Anascape’s case. To argue equivalence, Anascape resorts to describing the device, rather than the claim element. “A finding of equivalency just because the same result is achieved is a flagrant abuse of the term equivalent.” *Zygo Corp. v. Wyko Corp.*, 79 F.3d 1563,

1569 (Fed. Cir. 1996). Because there is no dispute that PSVC and FSR material are different structurally and in their principle of operation, there can be no equivalency. *See id.*

D. Failure to Provide Particularized Evidence

Although it bears the burden, Anascape does not offer any test evidence of its own. It offers only two conclusory sentences as evidence that PSVC material and FSR material work in the same way. (Wright Decl. ¶ 20.) Dr. Wright suggests that PSVC material and FSR material each change the “number of circuit paths through” the material. But, that is the characteristic of an FSR *sensor*, not of the FSR material itself. (Wright Decl. ¶ 10.) These cursory conclusions as to the insubstantiality of the differences should not withstand summary judgment. *See Stumbo v. Eastman Outdoors, Inc.*, 508 F.3d 1358, 1365 (Fed. Cir. 2007).

E. The All Element Rule Applies

Anascape claims that it “has not argued that PSVC Material is unnecessary.” (Resp. at 13.) That is false. In the very same brief, Anascape (improperly) requests “the Court to reconsider its claim construction that requires PSVC Sensors to include PSVC Material.” (Resp. at 9 n.6.)

The Court has construed every claim to require PSVC Material based on the written description. In this case, the public could not read the patents and conclude that the patentee was claiming sensors without PSVC material. (CC Order at 17.) Anascape unambiguously told the public that PSVC material was an important aspect of its “invention.” (CC Order at 15-16.) The public has a right to rely on those representations. As a matter of law, the doctrine of equivalents cannot eliminate the PSVC material limitation on which the public is entitled to rely. *See Sage Prod. v. Devon Indus.*, 126 F.3d 1420, 1425 (Fed. Cir. 1997).

Therefore, the Court should grant partial summary judgment of noninfringement.

Dated: January 22, 2008

Respectfully submitted,

By: /s/ Stephen J. Joncus

J. Christopher Carraway (admitted *pro hac vice*)

christopher.carraway@klarquist.com

Joseph T. Jakubek (admitted *pro hac vice*)

joseph.jakubek@klarquist.com

Stephen J. Joncus (admitted *pro hac vice*)

stephen.joncus@klarquist.com

Richard D. McLeod (Bar No. 24026836)

rick.mcleod@klarquist.com

Derrick W. Toddy (admitted *pro hac vice*)

derrick.toddy@klarquist.com

KLARQUIST SPARKMAN, LLP

121 S.W. Salmon Street, Suite 1600

Portland, Oregon 97204

Telephone: 503-595-5300

J. Thad Heartfield (Bar No. 09346800)

thad@jth-law.com

LAW OFFICES OF J. THAD HEARTFIELD

2195 Dowlen Road

Beaumont, Texas 77706

Telephone: 409-866-3318

Facsimile: 409-866-5789

Clayton E Dark Jr. (Bar No. 05384500)

clay.dark@yahoo.com

CLAYTON E DARK JR., LAW OFFICE

207 E Frank Ave # 100

Lufkin, TX 75901

Telephone: 936-637-1733

Stephen McGrath, Esq. (admitted *pro hac vice*)

MICROSOFT CORPORATION

One Microsoft Way, Building 8

Redmond, Washington 98052-6399

Telephone: 425-882-8080

Facsimile: 425-706-7329

Attorneys for Defendant Microsoft Corporation

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this the 22nd day of January, 2008. Any other counsel of record will be served by first-class mail.

By: /s/ Stephen J. Joncus

J. Christopher Carraway

christopher.carraway@klarquist.com

KLARQUIST SPARKMAN, LLP

121 S.W. Salmon Street, Suite 1600

Portland, Oregon 97204

Telephone: 503-595-5300

Facsimile: 503-595-5301