



OSTROLENK Successfully Defends Sears and Kmart in Patent Infringement Suit

OSTROLENK partner Max Moskowitz and associate Cameron S. Reuber successfully defended clients Sears Holdings Corp. and Kmart Corp. at trial in a patent infringement suit brought by inventor Line Rothman and her company, Glamourmom LLC, of New York. The plaintiffs were represented by Morgan & Finnegan, LLP.

Our clients achieved an impressive victory, with the jury returning a special verdict finding the asserted patent was: (1) invalid for anticipation by prior art; (2) invalid for obviousness over the prior art; (3) invalid for prior invention by Haidee Johnstone of co-defendant Leading Lady; and (4) unenforceable for inequitable conduct by Glamourmom before the U.S. Patent & Trademark Office.

Plaintiffs commenced the suit more than two years prior to trial in the U.S. District Court for the District of New Jersey before Chief Judge Garrett E. Brown, Jr. (Civil Action No. 3:05-cv-04829). The action centered on Glamourmom's attempt to enforce 16 claims of United States Patent No.

6,855,029 to Rothman ("the '029 patent"), styled "Stretchable Nursing Tank Top With Invisible Breast Support" against several members of the U.S. retail garment industry. The patent was alleged to cover certain garments containing a nursing flap secured by a shoulder clasp concealing a built-in nursing bra.

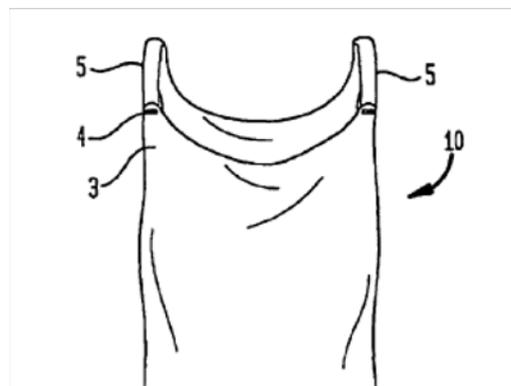


Fig. 1 (partial) of U.S. Patent No. 6,855,029

The Glamourmom suit alleged willful patent infringement against Sears and Kmart among several of its peer nationwide U.S. retailers, including Macy's, J.C. Penney, Target, Kohls, Lane Bryant, Liz Lange, and Amazon.com. Many of the accused parties settled prior to trial. Sears and Kmart, however, sought trial on the merits after several unsuccessful requests for Glamourmom to withdraw its complaint.

Following a trial spanning nearly three weeks, the jury deliberated for less than one day before finding for defendants Sears and Kmart.

Post-trial motions are currently pending before the court.

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Honeywell Affirms Infringement Following Contested Claim Construction

by Brenda Danek & David J. Torrente

The Federal Circuit recently reinforced the canon that the patentee can act as its own lexicographer, and the primacy of the specification in construing disputed claim terms. *Honeywell Int'l, Inc. v. Universal Avionics Sys. Corp.*, 493 F.3d 1358 (Fed. Cir. 2007). In *Honeywell*, plaintiff sued defendant over its patented final-approach flight warning system that used the alignment of the aircraft with the runway to determine whether a flight was on final approach. This information is used to suppress ground proximity warning alerts.

Under ordinary flight conditions, a ground proximity warning would alert the pilot to low clearance over surrounding terrain. This has successfully reduced the incidence of accidents termed “controlled flight into terrain” (CFIT), especially mountains or hillsides, and particularly when the aircraft is flying in low visibility by reference to instruments. However, on final approach to land, such warnings are a distraction.

At issue was the construction of a claim term “heading of the aircraft”. The District Court found that the patentees had used the term “heading of the aircraft” to refer to the concept that those skilled in the art would call its “bearing”. A majority of the panel agreed.

Circuit Judge Bryson wrote for the majority that “the ‘436 patent clearly communicates the meaning the patentees have assigned to the term ‘heading.’” That meaning, in fact, corresponded with the definition of the word “bearing.” The court examined the specification, examples and prosecution history to conclude that the claim term “heading” was used to indicate the bearing of the aircraft. According to the majority, the specification and examples do not provide any other interpretation of “heading” as used in the claims, and thus the district court properly construed the term as the definition understood by those skilled in the art to be “bearing.” The reasoning of the majority opinion emphasizes the hierarchy of claim construction tools, with the specification taking precedence over any extrinsic source of information, including popular understanding of people skilled in the art.

Judge Plager dissented to question the majority’s finding that the patentee redefined a term in a manner other than its ordinary meaning. The dissent argued that only when a patentee unambiguously redefines a term and so uses the term consistently throughout the specification can the unconventional meaning be given effect. In this case, the patentees did not use the term “heading” at all in the written description. While the majority defined the term primarily from the orientation of an aircraft to a runway in one of the drawings, the dissent argued that the inconsistent use of the



Aircraft on Final Approach to Landing at Kalaupapa Airport, Hawaii

http://en.wikipedia.org/wiki/Image:Kalaupapa_airport.jpg; Used with permission - Creative Commons 3.0

In Personam

Sean P. McMahon is OSTROLENK's Newest Associate

OSTROLENK is pleased to announce that Sean P. McMahon (right) has been elevated to the position of associate.

Mr. McMahon holds an LL.B. from Trinity College Dublin, 2003, in addition to an LL.M. from The George Washington University Law School, 2004. He is admitted to practice in New York, and the U.S. District Courts for the Southern and Eastern Districts of New York. His practice includes counseling clients in the adoption and protection of trademarks in the United States and worldwide. He has extensive experience with international laws relating to trademark protection and in the management of large international trademark portfolios. He also handles all aspects of *ex parte* and *inter partes* proceedings before the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office. Additionally, Mr. McMahon litigates various trademark and copyright related matters in federal court.

Sean also writes a frequent column called "Trademark Happenings" covering current developments in trademark law for the OSTROLENK newsletter.



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term between the description of the invention and during prosecution at most introduced confusion as to the proper construction of "heading," and that the majority inappropriately salvaged poorly or incorrectly drafted claims. Judge Plager suggested that confusion as to the term's meaning disturbs policy considerations behind the patent system, such as fair notice to the public and competitors as to the boundaries of the invention.

In addition to reiterating the primacy of the specification in construing claim terms, this case serves as a caution that the best claim language is most often drawn directly from the four corners of the specification, and later amendments that do not can be cause for future concern.

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