



Federal Circuit Review

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Indexing Not Required for Online Prior Art Publication

In *Voter Verified, Inc. v. Premier Election Solutions, Inc.*, Appeal No. 2011-1553, the Federal Circuit affirmed the district court's summary judgment of noninfringement and invalidity.

Voter Verified asserted a patent related to automated systems and methods for voting in an election. The patent disclosed a self-verification procedure by which machine and human error could be detected and corrected before tabulation. The district court held that the system claims were not infringed and not invalid and that the method claims were invalid. Voter Verified appealed and defendants cross-appealed as to the validity of the surviving claims.

The Federal Circuit affirmed the invalidity of the method claims over web-based prior art. The Federal Circuit found that evidence of indexing, while often relevant to public accessibility, is not a prerequisite to establishing the status of an online reference as a prior art printed publication. The key inquiry is whether the reference is sufficiently accessible to the public interested in the art before the critical date.

On infringement of its system claims, Voter Verified argued that the voter is an equivalent structure for carrying out the claimed ballot scanning function. The Federal Circuit held that "a human being cannot constitute a means within § 112, ¶ 6." The Federal Court, therefore, affirmed noninfringement. For method claims in which steps are performed by the voter, the court found that the defendants did not perform every step or exert control over the steps performed by the voters. According to the court, direct infringement requires more the controlling access to a system and also instructing others on its use.

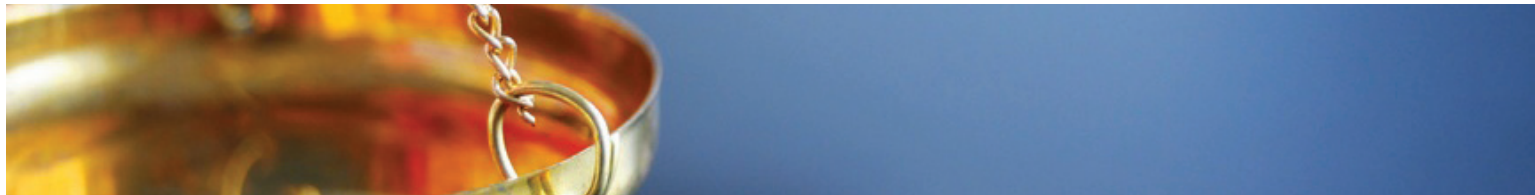
Claim Indefinite for Not Disclosing Any Structure

In *Eplus, Inc., v. Lawson Software, Inc.*, Appeal No. 2011-1396, the Federal Circuit reversed the district court's ruling that system claims were not indefinite and reversed in part the district court's denial of the defendant's motion for Judgment as a Matter Of Law ("JMOL") of noninfringement.

ePlus sued Lawson, alleging infringement of system and method claims directed to electronic management of supplies. The district court denied Lawson's summary judgment motion for invalidity, but granted Lawson's motion to exclude ePlus's damages expert under the *Daubert* case and to bar ePlus from presenting any evidence of damages during trial.

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The jury found that Lawson directly and indirectly infringed. The district court denied Lawson's motion for JMOL and issued a permanent injunction. Lawson and ePlus appealed.

The Federal Circuit reversed the district court's ruling that ePlus's system claims were not invalid as indefinite. The Court found that the specification failed to disclose any structure for the "means for processing" limitation. ePlus argued that it was not required to disclose a structure corresponding to the overall function because implementing that functionality was known in the prior art. But the court determines indefiniteness based on if one skilled in the art would have understood the specification to actually disclose structure for performing the claimed function.

The court also reversed in part the denial of JMOL of noninfringement. The court concluded that while ePlus had demonstrated that Lawson's software was capable of infringing, ePlus had failed to offer *any* evidence that showed or suggested that anybody had ever performed one of the method steps.

Finally, the Federal Circuit affirmed the district court's exclusion of ePlus's damages expert and its ruling that ePlus could not present any evidence of damages to the jury. The court agreed that the expert's analytical method was flawed and unreliable because the expert relied on particular license agreements that were obtained during litigation and included lump-sums received for multiple patents and cross-licensing deals. While ePlus proffered various justifications in support of the expert's analysis, the court declined to consider these arguments, noting instead that the applicable abuse of discretion standard of review is highly deferential.

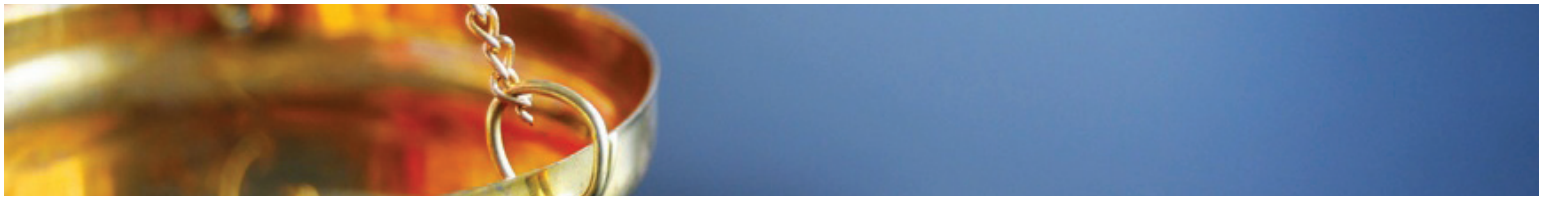
Aluminum Not Inherently Disclosed

In *ArcelorMittal France v. Ak Steel Corp.*, Appeal No. 2011-1638, the Federal Circuit affirmed in part and reversed in part the district court's claim construction, reversed the jury's verdict of anticipation and obviousness, and remanded.

ArcelorMittal sued AK Steel for infringement of a patent directed to hot-rolled sheet steel coated with aluminum. The term "hot-rolled steel sheet" was construed to exclude steel that was first hot-rolled and then cold-rolled. As construed, none of the accused products infringed literally, or under the doctrine of equivalents. The jury also found the asserted claims both obvious and anticipated. The district court denied ArcelorMittal's motion for JMOL, and ArcelorMittal appealed.

The Federal Circuit reversed the construction of "hot-rolled steel sheet." While the district court's construction was consistent with the ordinary meaning of the term in the industry, the specification was not consistent with that meaning. The specification disclosed an optional cold-rolling step and embodiments which only could be created by including cold-rolling. In addition, the claim included a "comprising" transition.

The Federal Circuit reversed the jury's verdict of anticipation and the district court's denial of JMOL as to anticipation. The court found that the reference that allegedly anticipated the claims did not expressly disclose the claimed element of coating with aluminum. The court also found that general statements in the reference did not disclose a "definite and limited class" of substances necessary to inherently disclose aluminum coating.



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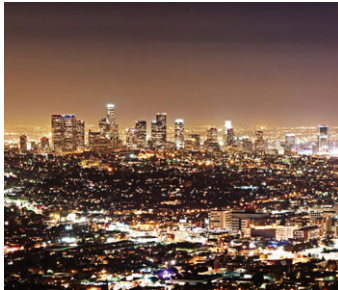
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