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Patents

Fed. Cir. Won't Hear Appeal of Infringer's Injunction Contempt Until Sanctions Set

A patent infringer liable for contempt for selling re-designed products that still infringe cannot appeal until sanctions are decided, the Federal Circuit ruled on July 17 (*Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, Fed. Cir., No. 2013-1357, 7/17/14).

The court rejected jurisdiction over an appeal of an order that the new products were a “colorable imitation” of previously enjoined products. Notably, the court refused to extend its recent en banc decision in *Robert Bosch*—on what a “final judgment” means in the patent infringement context—to contempt orders.

Its opinion is more of a warning to other prospective appellants, though, because the \$2.3 million sanctions against the appellant in this case have since been entered, and the appeal is now ripe.

“We hold only that an appeal from an injunctive order cannot be used as a way of securing interlocutory review of the contempt order,” the court said.

12-Year Patent Fight Continues. Arlington Industries Inc. and Bridgeport Fittings Inc. have been fighting a patent infringement battle since 2002, with the case coming before the U.S. Court of Appeals for the Federal Circuit twice previously (192 PTD, 10/3/03; 19 PTD, 1/28/11).

This case involves an Arlington patent (U.S. Patent No. 6,335,488) on electrical connectors that snap into place in a junction box. Arlington's Snap²It brand connectors embody the patent. Bridgeport used to sell SpeedSnap connectors but agreed to stop in an April 2004 litigation settlement agreement, recorded in an injunction issued by the U.S. District Court for the Middle District of Pennsylvania.

The agreement also enjoined Bridgeport from selling “any colorable imitations” of the SpeedSnap products

that, Bridgeport acknowledged, were infringing the '488 patent.

Bridgeport began selling Whipper-Snap brand connectors, and Arlington filed a motion for contempt, alleging that those connectors were such colorable imitations.

Judge A. Richard Caputo agreed. For the first time, he construed asserted claim terms and found infringement, now by connectors that were not colorably different from the SpeedSnap connectors.

Caputo expressly enjoined Bridgeport from selling the Whipper-Snap connectors in a new injunction order.

On April 26, 2013, Bridgeport appealed the contempt order, the claim constructions, the infringement findings, the scope of the order and the judgment that the new connectors were colorable imitations. Oral argument in this appeal was not held until Feb. 4.

The district court had not entered sanctions by that time. It finally did so on June 23, awarding over \$2.3 million to Arlington. 2014 BL 173822. On July 11, Bridgeport filed a notice of appeal of that decision to the Federal Circuit.

No Modification. Judge Todd M. Hughes wrote the court's opinion, refusing to take notice of the sanctions order. Thus, the court's decision merely goes to whether it had jurisdiction over this pre-sanctions appeal.

Bridgeport argued that jurisdiction arose under both 28 U.S.C. §§ 1292(c)(1) and (c)(2). Subsection (c)(1) allows for interlocutory appeals when a district court modifies an injunction; subsection (c)(2) gives the Federal Circuit jurisdiction over judgments in patent infringement cases that are “final except for an accounting.”

The issue as to the former revolved solely around whether the 2013 injunction order could be considered a non-appealable clarification or an appealable modification of the 2004 order. The court relied on precedent to determine it was not a modification.

Entegris, Inc. v. Pall Corp., 490 F.3d 1340, 1343, 2007 BL 32769, 83 U.S.P.Q.2d 1001 (Fed. Cir. 2007) (118 PTD, 6/20/07), also involved a “clarification-or-modification” question where the original injunction also barred colorable imitations. The case also featured a new injunction after a product redesign, and the court there explicitly stated it was not modifying the original injunction.

Though there was no explicit statement in the instant case, the court said the cases were parallel.

As in *Entegris*, the court said, “Because clauses of both injunctions are almost identical in wording and are congruent in meaning, the legal relationship between the parties is not altered.”

Bridgeport argued that the recent injunction modified the infringement finding based on a new claim construction, but the court was not swayed. The infringement judgment was simply more specific in naming the colorable imitations that the 2004 injunction barred generally, the court said.

And the court had “previously held that first-time claim constructions provided in the course of contempt proceedings were clarifications, not modifications,” in *Aevoe Corp. v. AE Tech Co.*, 727 F.3d 1375, 1382-83, 2013 BL 230818, 107 U.S.P.Q.2d 2141 (Fed. Cir. 2013).

Not Final. As for 28 U.S.C. 1292(c)(2), the en banc Federal Circuit recently decided that judgments were final, even if damages had not yet been decided, in a patent infringement case, in *Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 2013 BL 157306, 107 U.S.P.Q.2d 1113 (Fed. Cir. 2013).

The court acknowledged that subsection (c)(2) was created as “an exception to the final judgment rule in patent cases.” However, it said, “this patent carve-out does not expressly include contempt orders. Accordingly, § 1292(c)(2) does not extend to contempt orders.”

Judges Raymond T. Chen and Raymond C. Clevenger III joined the opinion.

Kathryn L. Clune of Crowell & Moring LLP, Washington, represented Arlington. Alan M. Anderson of Alan Anderson Law Firm LLC, Minneapolis, represented Bridgeport.

By TONY DUTRA

Text is available at http://www.bloomberglaw.com/public/document/Arlington_Industries_Inc_v_Bridgeport_Fittings_Inc_Docket_No_1301.