2021-1937, 2021-1984

United States Court of Appeals
for the
Federal Circuit

VOCALIFE LLC,
Plaintiff-Cross-Appellant,

v.

AMAZON.COM, INC., AMAZON.COM, LLC,
Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Texas in
Nos. 2:19-cv-00123-JRG, Chief Judge J. Rodney Gilstrap

PLAINTIFF-CROSS APPELLANT VOCALIFE LLC'S COMBINED PETITION FOR REHEARING AND REHEARING *EN BANC*

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August 29, 2022

CERTIFICATE OF INTEREST

Counsel for Vocalife LLC certifies the following:

1. Provide the full names of all entities represented by undersigned counsel in this case:

   Vocalife LLC

2. Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities:

   None/Not Applicable

3. Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more of the stock in the entities:

   Algovate Inc. (parent corporation)

4. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4):

   McKOOL SMITH, P.C., 104 East Houston Street, Suite 300, Marshall, Texas 75670; Samuel F. Baxter and Jennifer Truelove

   BROWN RUDNICK, LLP, 7 Times Square, New York, New York 10036; Alessandra C. Messing

   FABRICANT LLP, 411 Theodore Fremd Avenue, Suite 206 South, Rye, New York 10580; Jacob Ostling and Samantha Fabricant

5. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

***Vocalife LLC v. Amazon.com, Inc. and Amazon.com Services, Inc.*, Case No. 2:20-cv-00401-JRG-RSP (USDC-E.D. Tex.)**

***Amazon.com, Inc. v. Vocalife LLC*, IPR2021-01331 (P.T.A.B.)**

***Vocalife LLC v. Google LLC*, Case No. 2:21-cv-00214-JRG (USDC-E.D. Tex.)**

***Google LLC v. Vocalife LLC*, IPR2022-00004 (P.T.A.B.)**

***Google LLC v. Vocalife LLC*, IPR2022-00005 (P.T.A.B.)**

6. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable

Dated: August 29, 2022 By: */s/ Alfred R. Fabricant*
Alfred R. Fabricant
Fabricant LLP

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STATEMENT OF COUNSEL

The asserted claims of the Asserted Patent includes a "plurality of configurations" limitation. This limitation was construed by the district court as "for said array of sound sensors in a plurality of geometric layouts of the sound sensors." Appellants Amazon.com, Inc. and Amazon.com LLC did not appeal the district court's construction of this limitation.

On appeal, in a non-precedential opinion, the panel reversed-in-part and dismissed-in-part. *Vocalife LLC v. Amazon.com, Inc.*, No. 21-1937, Dkt. 73 at 6 (Fed. Cir. July 28, 2022). The panel stated that Vocalife did not show "that the delay determination occurring on a given Echo device enables beamforming for a plurality of configurations." *Vocalife LLC v. Amazon.com, Inc.*, No. 21-1937, Dkt. 73 (Fed. Cir. July 28, 2022).

Based on my professional judgment, I believe the Panel decision is contrary to the district court's claim construction where the claim construction was not expressly appealed. The Panel did not undertake a *de novo* review of the district court's claim construction in its Opinion. At minimum, the Opinion should have set forth a *de novo* review of the construction for the "plurality of configurations" limitation and remanded the case to the district court.

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure and this Court's rules, the following points of law or fact were misapplied by the Panel's

order: (1) the Opinion contradicts the district court's claim construction, which stands as a matter of law in the absence of any *de novo* review, of the "plurality of configurations" limitation; (2) the Panel failed to undertake and set forth a *de novo* review of the claim construction; and (3) the Panel misapplied the district court's claim construction by adding a requirement that the configurations be "physical," which is a limitation that was expressly rejected in the district court's *Markman* analysis.

I. INTRODUCTION

Vocalife respectfully asks this Panel to reconsider its ruling in light of the clarifications provided. By holding that the Amazon Echo devices do not meet the "plurality of configurations" limitation, the Panel's decision is inconsistent with the District Court's claim construction order or relies on an implicit claim construction for a claim limitation that was not raised by Amazon on appeal. Due to the Panel's error in either applying an inconsistent interpretation of this claim construction, or an implicit claim construction without the required *de novo* review, Vocalife requests the Panel undertake a *de novo* review of the district court's construction for the "plurality of configurations" limitation.

In the alternative, Vocalife seeks review *en banc*.

II. BACKGROUND

Vocalife filed a suit for patent infringement against Amazon on April 16, 2019, alleging infringement of U.S. Patent No. RE47,049 (the "'049 Patent"). During claim construction, Amazon submitted thirteen terms for construction, including the term "for said array of sound sensors in a plurality of configurations," which the district court held should have the following construction: "for said array of sound sensors in a plurality of geometric layouts of the sound sensors."

The district court conducted a trial from October 1, 2020 through October 8, 2020. After the six-day trial, the jury found that Vocalife had proven that the

Asserted Claims, claims 1 and 8 of the ’049 Patent, were indirectly infringed by Amazon.

On December 18, 2020, Amazon filed a motion for judgment as a matter of law of non-infringement under Rule 50(b), seeking to overturn the jury’s verdict regarding induced infringement. The district court denied Amazon’s motion, holding Vocalife “presented substantial evidence that the Accused Products met the disputed claim limitations.”

Amazon appealed the denial of its motion for judgment as a matter of law of non-infringement and Vocalife cross-appealed for a grant of summary judgment by the district court on two issues: absolute intervening rights and pre-suit induced infringement.

A panel of this Court granted Amazon’s appeal, holding “there is no substantial evidence to support infringement of the ‘plurality of configurations’ limitation,” and reversing the district court’s denial of Amazon’s motion, vacating the jury verdict, and dismissing Vocalife’s cross-appeal as moot. The Panel’s opinion does not set forth any review of the district court’s claim construction for the “plurality of configurations” limitation. Vocalife seeks rehearing on this ground.

III. ARGUMENT

The Panel’s ruling is inconsistent with the District Court’s claim construction order or unfairly relies on an implicit claim construction for a claim limitation that

was not raised by Amazon on appeal. The Panel should grant rehearing to reconsider its Order in view of the correct understanding of the facts and law. *See* Fed. R. App. P. 40(a)(2).

The Panel found no substantial evidence to support infringement of the "plurality of configurations" limitation. The district court construed the limitation "for said array of sound sensors in a plurality of configurations" to mean "for said array of sound sensors in a plurality of geometric layouts of the sound sensors." Appx1306-Appx1308. In its analysis, the district court found that "the claims are silent as to how the configuration of sensors is actually formed" and that "[t]his allows that a variety of configurations may be formed by other than physically placing the sensors in different positions." Appx1308.

The Panel erred by applying either (1) an inconsistent interpretation of this claim construction, or (2) an implicit claim construction, without the required *de novo* review. Because the Panel endeavored to find "evidence showing that the coefficients loaded onto a given Echo device enable beamforming for a variety of microphone configurations," a microphone being a physical component, the Panel's ruling is inconsistent with the district court's claim construction. The Panel should undertake a *de novo* review of the district court's construction for the "plurality of configurations" limitation.

Vocalife submitted substantial evidence to show infringement of the "plurality of configurations" limitation, as construed by the district court. Mr. McAlexander, Vocalife's expert, testified that Amazon's source code shows the manner of determining a delay to enable beamforming works across a plurality of configurations. Resp. Br. at 32-33. ("The reason it's done in a plurality of configurations is because . . . the Doppler can be utilized across two different products. . . . The MPAF can be provided across all the other products."). This was confirmed by Dr. Sayfe Kiaei, Amazon's own expert, who testified that the Accused Products use common code bases. Resp. Br. at 33. This evidence is sufficient under the district court's express claim construction, as well as the district court's *Markman* analysis, which explained that "the claims are silent as to how the configuration of sensors is actually formed" and that "this allows that a variety of configurations may be formed by other than physically placing the sensors in different positions." Indeed, neither expert attempted to advance an interpretation of the claim that required multiple physical configurations of the microphone arrays. Amazon did not dispute the claim construction or the existence of the evidence at trial during briefing. Appx7362-Appx7397.

"Claim construction is ultimately a question of law, decided de novo on review, as are the intrinsic-evidence aspects of a claim-construction analysis." *Intel Corp. v. Qualcomm Inc.*, 21 F.4th 801 (Fed. Cir. 2021). While the Federal Circuit

is not precluded from addressing and adopting a new construction on appeal, *see Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1323-24 (Fed. Cir. 2008), the Panel did not address or meet its "independent obligation to construe the terms of a patent." *Id.* Because the Panel did not conduct a *de novo* review or set forth the basis of its review of the district court's claim construction in reaching its decision, Vocalife respectfully requests the Panel reconsider its ruling.

IV. CONCLUSION

The Court should grant rehearing, either for the Panel to reconsider the points it misapplied, or for the *en banc* Court.

Dated: August 29, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that PLAINTIFF-CROSS-APPELLANT'S COMBINED PETITION FOR REHEARING AND REHEARING *EN BANC* complies with the type-volume limitation of Fed. R. App. P. 21(d). The Brief contains 1,280 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This Brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: August 29, 2022

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25 and Fed. Cir. R. 25, I certify that I caused the foregoing brief to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record.

Dated: August 29, 2022

Respectfully submitted,

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ADDENDUM

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

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VOCALIFE LLC,
Plaintiff-Cross-Appellant

v.

AMAZON.COM, INC., AMAZON.COM LLC,
Defendants-Appellants

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2021-1937, 2021-1984

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Appeals from the United States District Court for the Eastern District of Texas in No. 2:19-cv-00123-JRG, Chief Judge J. Rodney Gilstrap.

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Decided: July 28, 2022

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ALFRED ROSS FABRICANT, Fabricant LLP, Rye, NY, argued for plaintiff-cross-appellant. Also represented by ENRIQUE WILLIAM ITURRALDE, PETER LAMBRIANAKOS, VINCENT J. RUBINO, III.

JOSEPH R. RE, Knobbe, Martens, Olson & Bear, LLP, Irvine, CA, argued for defendants-appellants. Also represented by ALAN GRAYSON LAQUER; COLIN B. HEIDEMAN, Seattle, WA.

____

Before MOORE, *Chief Judge*, PROST and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

Defendants-Appellants Amazon.com, Inc. and Amazon.com LLC appeal from the United States District Court for the Eastern District of Texas' denial of Amazon's motion for judgment as a matter of law on the issue of noninfringement. Plaintiff-Cross-Appellant Vocalife LLC cross-appeals two of the district court's summary judgment grants. Because there is no substantial evidence to support infringement of the "plurality of configurations" limitation, we reverse the district court's denial of Amazon's motion for judgment as a matter of law, vacate the jury verdict, and dismiss Vocalife's cross-appeal as moot.

I

Vocalife owns U.S. Patent No. RE 47,049, which is directed to methods and systems for "enhancing acoustics of a target sound signal received from a target sound source, while suppressing ambient noise signals." '049 patent, 2:6–8. Claim 1 of the '049 patent covers one such method and recites a number of steps, including "providing a microphone array system comprising an array of sound sensors positioned in a linear, circular, or other configuration" and "determining a delay . . . wherein said determination of said delay enables beamforming for said array of sound sensors in a plurality of configurations."[1] *Id.*, 21:27–22:3 (claim 1). We refer to the latter step as the "plurality of configurations" limitation.

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[1] "Beamforming" refers to a signal processing technique by which the disclosed microphone array can focus on a sound signal coming from a particular direction instead of sound signals from other directions. *See* '049 patent, 5:65–6:2, 6:17–23.

Vocalife filed a patent infringement suit against Amazon, accusing certain Amazon Echo products of infringing the ’049 patent. At the summary judgment stage, the district court granted summary judgment that, among other things, absolute intervening rights under 35 U.S.C. § 252 apply to certain Echo products and Vocalife was not entitled to damages for pre-suit induced infringement. The case proceeded to trial. Amazon moved for judgment as a matter of law (JMOL) of noninfringement after the close of evidence. The district court denied JMOL of no induced infringement but granted JMOL of no direct or contributory infringement by Amazon and no infringement under the doctrine of equivalents. Thus, the only infringement issue for the jury to decide was whether Amazon induced users of the Echo to literally infringe the patent. After the six-day trial concluded, the jury returned a verdict finding that Amazon did. Amazon renewed its motion for JMOL of no induced infringement, which the district court again denied.

Both parties appeal. Amazon appeals the denial of its JMOL motion. Vocalife cross-appeals the two summary judgment grants. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

II

We review JMOL denials under the law of the regional circuit, here the Fifth Circuit, which reviews such denials de novo. *Raytheon Co. v. Indigo Sys. Corp.*, 895 F.3d 1333, 1338 (Fed. Cir. 2018). JMOL “is appropriate only where ‘the facts and inferences point so strongly and overwhelmingly in favor of one party that the court concludes that reasonable jurors could not arrive at a contrary verdict.’” *Id.* (quoting *Orion IP, LLC v. Hyundai Motor Am.*, 605 F.3d 967, 973 (Fed. Cir. 2010) (applying Fifth Circuit law)). Thus, “[w]e affirm a district court’s denial of [JMOL] when there was substantial evidence to support the jury’s verdict.” *Id.* (citing *Power-One, Inc. v. Artesyn Techs., Inc.*,

599 F.3d 1343, 1350 (Fed. Cir. 2010) (applying Fifth Circuit law)).

III

Vocalife contends it provided substantial evidence that the Echo infringes the "plurality of configurations" limitation. At trial, Vocalife's expert, Joseph McAlexander, testified that the Echo determines a delay as part of its beamforming process using inputs from the incoming target sound signal in conjunction with certain information—beam coefficients—stored on the device. *See, e.g.*, Appx6326–27 at 617:19–618:3; Appx6340–42 at 631:2–633:19; Appx6427–28 at 718:10–719:22; Appx6429 at 720:10–17. As Mr. McAlexander testified, Amazon calculated the pre-loaded beam coefficients via computer simulation during development of the Echo and pre-loaded those coefficients onto the Echo devices during manufacturing. *See, e.g.*, Appx6326–27 at 617:3–618:3; Appx6390–91 at 681:24–682:7. Mr. McAlexander further testified that the Echo's delay determination enables beamforming for a plurality of configurations because the software code running on the Echo can be utilized across different Echo products with different microphone array configurations. *See, e.g.*, Appx6297–98 at 588:21–589:14; Appx6339–40 at 630:20–631:1.

None of this testimony, however, supports the conclusion that the Echo products infringe the '049 patent. The testimony does not show that the delay determination occurring on a given Echo device enables beamforming for a plurality of configurations, as claim 1 requires. If anything, Mr. McAlexander's testimony suggests that this determination enables beamforming for only the specific microphone array configuration on that specific device.[2]

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[2] At oral argument, Vocalife hypothesized that "there could be" multiple configurations on a given Echo

Mr. McAlexander repeatedly described the pre-loaded beam coefficients as being specific to a "particular" microphone array. *See, e.g.*, Appx6325–26 at 616:14–617:2 (Amazon's computer simulation is "a construct by which they take the instantiation of a particular microphone array organized in a certain fashion, arranged in a certain architecture" to create beam coefficients "that are associated with [ ] that particular kind of a structure."); Appx6326 at 617:7–18 (Amazon "take[s] a specific designed architecture with a physical arrangement of the microphones" to provide the beam coefficients, which "go[] into the [ ] initial construct of how the beams will be formed once they are instantiated in the accused device."); Appx6327 at 618:6–11 (The beam coefficients "include the understanding of how that arrangement of the architecture is," as "you have to define the microphone array first."); Appx6437 at 728:8–14 (Amazon determines the beam coefficients "based on an architectural arrangement or a layout of the sound sensors" and "that calculation is already built into the coefficients that are then programmed into this device."). While it is undisputed that Amazon pre-loads certain beam coefficients onto each Echo device, Vocalife provides no evidence showing that the coefficients loaded onto a given Echo device enable beamforming for a variety of microphone configurations, as opposed to only the configuration

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device "in the situations where not all of the microphones are operating or certain microphones aren't receiving the sound or performing as designed." Oral Argument at 20:00–20:09, https://oralarguments.cafc.uscourts.gov/default.aspx?fl=21-1937_07072022.mp3. This contention, which appears nowhere in Vocalife's briefing, comes too late. *See Henry v. Dep't of Justice*, 157 F.3d 863, 865 (Fed. Cir. 1998) (declining to consider argument raised for the first time at oral argument). In any event, Vocalife cites no evidence—nor have we found any—showing that these hypothetical configurations exist.

of that particular device. Mr. McAlexander's conclusory, unsupported testimony that the Echo meets the "plurality of configurations" limitation, *see* Appx6338 at 629:2–14, is otherwise insufficient to support the jury's infringement verdict, *see, e.g.*, *Yoon Ja Kim v. ConAgra Foods, Inc.*, 465 F.3d 1312, 1320 (Fed. Cir. 2006) (affirming JMOL of noninfringement where patentee's expert offered only conclusory, unsupported testimony).

Because there is no substantial evidence showing that any delay determination occurring on a given Echo device enables beamforming for a microphone array "in a plurality of configurations," we conclude that Vocalife failed as a matter of law to prove that the Echo infringes claim 1 of the '049 patent. We reverse the district court's denial of JMOL of no induced infringement and vacate the jury verdict. This moots Vocalife's cross-appeal, and we accordingly dismiss as moot Appeal No. 2021-1984.

REVERSED IN PART, DISMISSED IN PART

Costs to Defendants-Appellants.