

~~POSITA would know was also nascent given that the laser industry was at its infancy. See *Could v. Hellwarth*, 472 F.2d 1383 (C.C.P.A. 1973).~~

~~6. *Disclosure as Facilitator*. Disclosure sufficiency doctrines put pressure on the patent applicant to have better disclosure or face invalidity risk for the claims. Better disclosure makes the patent a better research source. What other values might disclosure promote?~~

~~Rather than thinking about the disclosure function in terms of what patents themselves reveal, we should instead focus on the role patents play in causing the disclosure of valuable technical information through other vehicles. And rather than looking at the patent system as needing to *force* inventors to reveal their secrets, we should instead recognize that in many instances inventors *want* to share information about their inventions and the patent system frees them up to do so in ways that would not be possible in its absence.~~

~~Jason A. Rantanen, *Peripheral Disclosure*, at 5, U. PITT L. REV. (forthcoming).~~

§ 6.03 Written Description

What does the written description doctrine add to the legal scrutiny of a patent's disclosure above and beyond that of the enablement doctrine?

One might discern three possible roles for the written description doctrine. First, it might “police priority for new matter.” In a moment, this section will give more on that arcane bit of patent law nomenclature. Second, written description might operate as a standalone disclosure sufficiency doctrine. In that role, the dilemmas relate to whether it might or should differ from enablement and whether two such doctrines are needed. Third, it might operate somewhere in between definiteness and enablement, helping constrain claim scope by requiring some information in the original specification that indicates the outer bound of the original or later-filed claims, either as a doctrine that invalidates claims outright, or channels their construction to a narrower scope. Note that in this third role, the written description doctrine does not suffer the permissiveness of enablement’s “undue experimentation” proviso that may save a claim from invalidity due to alleged nonenablement.

The first role, “priority policing,” is the historical role for written description, but the second and third roles are also now a part of the doctrine. The priority policing role relates to the ability of an applicant to modify both the claims and the specification during patent prosecution. Modifications to the specification, however, are constrained to not introduce “new matter.” 35 U.S.C. § 132(a). Under the written description doctrine, new or amended claims must be supported by the originally filed disclosure. Any new words added to the specification after the original filing cannot be necessary to support any of the claims, unless those new words merely augment information already present. For example, 13 months after filing, the patent applicant would not want to add a paragraph to the specification and then write five new claims that depend on that paragraph. Why not? What policy concerns prevail against this? If the patentee continues to develop the invention during those 13 months, she has the advantage of that additional information to heighten the quality of her claims, if patent law would allow her that advantage. The written description doctrine eliminates the advantage by instead forcing the patentee to choose: either wait 13 months and then file, or file earlier and live with whatever claims that you can write against the originally filed disclosure.

ATLANTIC RESEARCH MARKETING SYSTEMS, INC. V. TROY

659 F.3d 1345 (Fed. Cir. 2011)

PROST, J.

Atlantic Research appeals from the grant of summary judgment by the United States District Court for the District of Massachusetts invalidating claims 31-36 of U.S. Reissue Patent No. 39,465 (“465 patent”) for failing to meet the written description and best mode requirements. Because the district court did not err in invalidating these claims on written description grounds, we affirm. We decline to address the best mode issue.

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I

A

This case is about weapons technology and a business relationship gone sour. Atlantic Research is an arms manufacturing company that focuses on accessories for small arms weaponry, including handguards that attach to military rifles. Richard Swan founded Atlantic Research in 1980, co-owns it with his wife, and is the named inventor of twenty-four patents in the weapons field. Mr. Swan’s patents include U.S. Patent No. 6,499,245 (“245 patent”) and its reissue, the ’465 patent, both of which claim a handguard device. Atlantic Research includes among its customers the United States military.

Mr. Swan met Stephen Troy in early 2002. Mr. Troy soon became a distributor for Atlantic Research. Their business relationship continued to develop, and eventually Mr. Troy became an employee of Atlantic Research. He signed a nondisclosure agreement as part of his employment. Involved in all aspects of Atlantic Research’s business, Mr. Troy soon became Mr. Swan’s “right-hand man.” Mr. Swan familiarized Mr. Troy with Atlantic Research’s products and explained to him how and why products were designed as they were. This included showing Mr. Troy the prototypes of each of Atlantic Research’s products.

In early 2003, Mr. Troy and Mr. Swan attended a weapons industry show to promote Atlantic Research’s products. Sometime prior to the show, Mr. Troy began developing a weapons product for his own company, Troy Industries. Mr. Swan was aware of this and allowed Mr. Troy to promote his product from Atlantic Research’s booth at the trade show. Mr. Swan, however, learned at the show that Mr. Troy had registered for a booth of his own for the following year. Things quickly deteriorated after that, and Mr. Swan terminated Mr. Troy’s employment with Atlantic Research at the end of February. Almost immediately thereafter, Troy Industries prepared a proposal in response to a broad solicitation from the Crane Naval Warfare Center. The proposal described a free-floating handguard system for use with rifles.

Free-floating handguards, and the means by which they attach to rifles, are at the heart of this case. The free-floating handguard, as explained in the background of one of the patents at issue, solves . . . the problem of how to better equip military rifles. Ancillary devices, such as integrated laser systems, could not be attached directly to the barrel of a rifle without potentially damaging both the rifle and the added device; the device could cause the barrel to bend and the extreme heat from the barrel could damage the added device. A handguard that surrounded the barrel of the firearm without touching the barrel avoided these problems.

Troy Industries never submitted the proposal to Crane, deciding it did not have the capability to create physical prototypes at that time. In 2004, however, Troy began offering handguards that attached to rifles solely by clamping to the barrel nut. The barrel nut, which screws onto a threaded receiver on the upper receiver, is used to attach the barrel to the upper receiver. Troy's handguards competed with those of Atlantic Research. Mr. Troy testified that he came up with the idea for the single-clamp handguard in July of 2003 while vacationing with his family in Turkey. Mr. Troy sought a patent for this invention in 2005, and U.S. Patent No. 7,216,451 issued in May of 2007, with Mr. Troy as the named inventor.

Atlantic Research filed a complaint against Troy on August 23, 2007. The complaint consisted of two general categories of claims. First, Atlantic Research alleged that Troy infringed the '465 patent claiming a handguard device. Second, Atlantic Research alleged that Troy misappropriated its trade secrets, and was liable under various additional related Massachusetts state law claims. The district court bifurcated the case along those lines.

B

Turning to the patent claims, Atlantic Research accused Troy of infringing the '465 patent, a reissue of the '245 patent. Troy, through its defenses and counter-claims, alleged that the '465 patent was invalid. The district court agreed with Troy, finding claims 31-36 of the '465 patent invalid for failing to meet the written description and best mode requirements at the summary judgment stage. Regarding written description, the court concluded that the '465 patent specification did not disclose a handguard that attached solely to the barrel nut of the gun, but construed the asserted claims (claims 31-36) to cover such an invention. Because the asserted claims covered subject matter not disclosed in the specification, the court invalidated these claims.

Atlantic Research's trade secret claim survived summary judgment, and the court set the matter down for trial. Ultimately, the district court presided over a two week trial addressing whether Atlantic Research possessed a valid trade secret and, if so, whether Mr. Troy wrongly appropriated that trade secret.

Mr. Swan identified a free-floating handguard that attached to a weapon solely at the barrel nut as his alleged trade secret. . . .

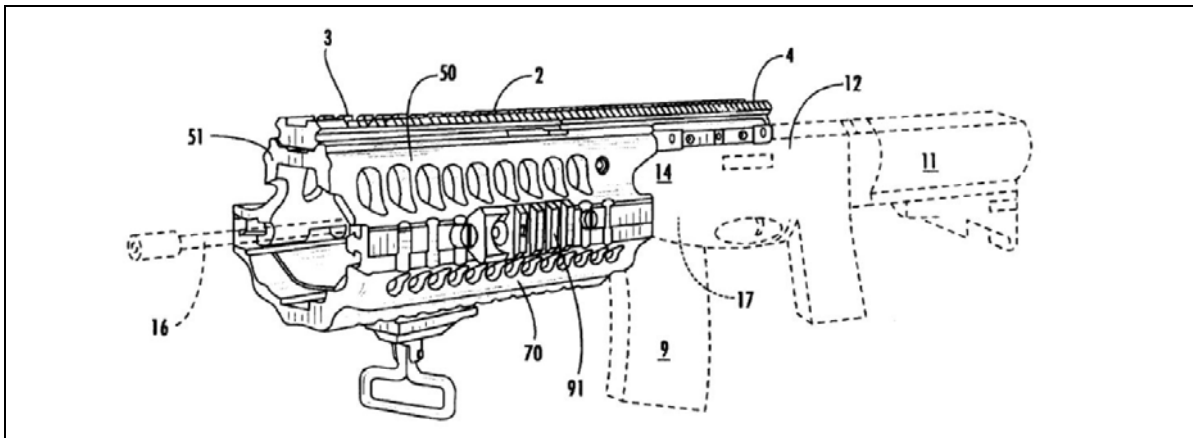
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II

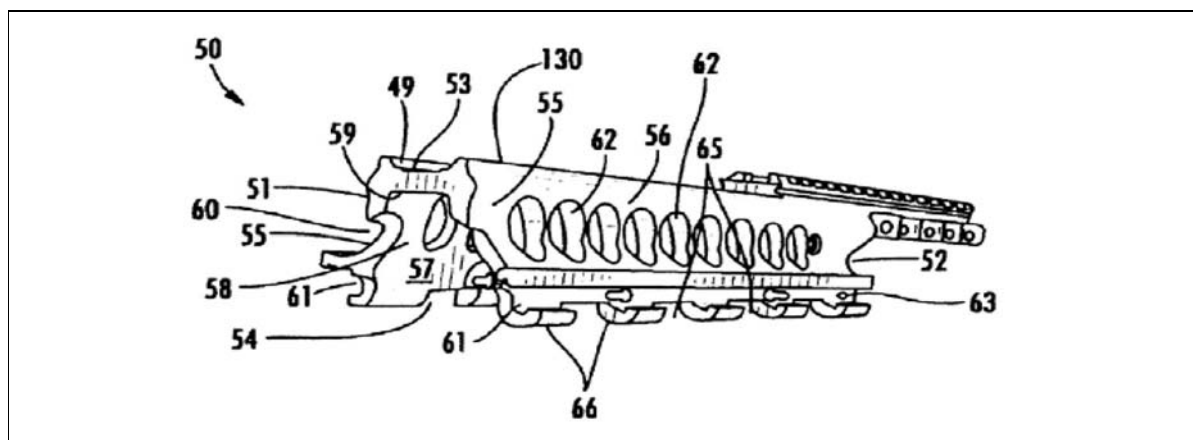
We turn first to Atlantic Research's appeal of the district court's grant of summary judgment invalidating claims 31-36 of the '465 patent under 35 U.S.C. § 112 for failing to meet the written description requirement. As noted above, facing a claim that its product infringed Atlantic Research's '465 patent, Troy contended that this patent was invalid.

The invention disclosed in the '465 patent involves a "sleeve" accessory that attaches to a firearm, as shown below. The accessory consists of three primary components: a receiver sleeve, an upper handguard piece, and a bottom handguard piece. The receiver sleeve, depicted by numbers 2, 3, and 4, attaches through its rear portion (4) to the top of the firearm. The front portion of the receiver sleeve extends down the firearm's barrel. This front portion connects to the upper handguard piece, represented by numbers 50 and 51. The bottom handguard piece, referenced by number 70, attaches to the upper handguard piece. The handguard pieces are not physically connected to the gun barrel. Instead, the receiver sleeve is "self supported" by its

connection to the top of the gun. The area on the top of the gun where the receiver sleeve attaches is called the “receiver top.”



Although the receiver sleeve is “self supported” by its connection to the receiver top, “additional support may be provided by . . . a special yoke about the barrel nut of the firearm.” The yoke, also referred to as a “clamp” at trial, provides this additional support by engaging the firearm’s barrel nut. This engagement occurs roughly in the area denoted by numbers 52 and 63 in the drawing below.



The two support points in the invention (at the receiver sleeve and the barrel nut) permit the upper and bottom handguard pieces to surround the barrel of the gun without touching it. As explained earlier, this design enables a firearm user to operate ancillary devices such as integrated laser devices in complete isolation from the gun barrel, thereby protecting these devices from the heat and shock associated with firing the weapon. This design also prevents the barrel from bending under the weight of the handguard and attached devices.

Atlantic Research contends that Troy’s Modular Rail Forend (“MRF”) product infringes claims 31-36 of the ’465 patent. The MRF product, like the disclosures in the ’465 patent, is a free-floating handguard accessory (i.e., a handguard accessory that surrounds, but does not touch, the gun barrel). This product, however, attaches to the firearm in only one location: the barrel nut. The MRF product does not have a receiver sleeve attachment point.

Of the asserted claims, claim 31 is the only independent claim, with claims 32-36 depending therefrom. Claim 31 reads:

31. A system for attaching modular enhancements to a firearm, said firearm having a receiver, said receiver having a top and a barrel receiving receptacle at a forward end thereof, said firearm further including a barrel received in said barrel receiving receptacle and a barrel nut received around an outer surface of said barrel receiving receptacle to retain said barrel within said barrel receiving receptacle, said system comprising:

an upper handguard piece having a forward end and a rearward end, and further having a dovetail rail extending longitudinally between the forward end and the rearward end;

a U-shaped supporting yoke re-movably secured to said rearward end of said upper hand guard, said U-shaped supporting yoke including engagement surfaces configured to cooperatively engage an outer surface of said barrel nut and thereby support said upper handguard piece relative to said barrel nut, wherein said upper handguard piece extends from said forward end of said upper receiver forwardly above said barrel without engaging said barrel.

While claim 31 explicitly claims a barrel nut support point, it mentions nothing about a receiver sleeve support point. Before reaching the written description question, the district court construed claim 31 as permitting the barrel nut to provide complete support for the handguard accessory. The court then concluded, however, that the '465 specification “does not describe a handguard that can be supported solely by clamping to the barrel nut,” and instead “describes an invention that is supported by both the barrel nut and attachment to the upper receiver via a receiver sleeve.” After construing claim 31 to cover the barrel nut-only attachment design, but then finding that the specification did not disclose such a design, the court invalidated claims 31-36 for failing to meet the written description requirement of 35 U.S.C. § 112.

On appeal, Atlantic Research argues that the district court erred by construing claim 31 to cover a handguard device supported solely by the barrel nut of the gun, asserting that this construction conflicts with the specification, which does not disclose a barrel nut-only attachment design. Under the claim construction proposed by Atlantic Research, the barrel nut only has to provide partial support for the handguard accessory, not complete support, which would leave room for the receiver sleeve to provide support as well. According to Atlantic Research, if claim 31 were construed in this manner, it would not fail on written description grounds because the specification does in fact teach an invention where the barrel nut and receiver sleeve each provide partial support for the handguard accessory.

Troy responds that the district court properly construed claim 31 and did not err in invalidating claims 31-36 on written description grounds. In particular, Troy contends that Atlantic Research received the claim construction it requested (i.e., one that permits the barrel nut to provide complete support), emphasizing that Atlantic Research argued at the Markman hearing that the handguard is “supported by the barrel nut with or without the receiver sleeve” and that the receiver sleeve “could provide additional support but not necessary support.” According to Troy, Atlantic Research needed this broad construction to mount a colorable charge of infringement against the accused products, which undisputedly attach to and receive support from only the barrel nut.

For the reasons stated below, we conclude that the district court properly granted summary judgment invalidating claims 31-36 for failing to meet the written description requirement.

While “[c]ompliance with the written description requirement is a question of fact,” this issue is “amenable to summary judgment in cases where no reasonable fact finder could return a verdict for the non-moving party.” . . .

The written description requirement, set forth in 35 U.S.C. § 112, ¶ 1, states: “The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art . . . to make and use the same.” An adequate written description “reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc). “[T]he hallmark of written description is disclosure.” The specification “must describe an invention understandable to [a] skilled artisan and show that the inventor actually invented the invention claimed.” *Id.* “The purpose of the written description requirement is to ensure that the scope of the right to exclude, as set forth in the claims, does not overreach the scope of the inventor’s contribution to the field of art as described in the patent specification.” *In re Katz Interactive Call Processing Patent Litigation.*, 639 F.3d 1303, 1319 (Fed. Cir. 2011).

“[C]laim construction is inherent in any written description analysis.” . . .

Here, the ’465 specification discloses an invention with two support points, one at the receiver sleeve and one at the yoke/barrel nut. The ’465 specification also appears to disclose an invention where the receiver sleeve provides complete support for the handguard accessory. But as the district court explained and as Atlantic Research admitted at oral argument, the specification does not disclose an invention where the yoke/barrel nut attachment point provides complete support for the handguard accessory. (At oral argument, Atlantic Research’s counsel represented that he “agree[d] wholly with the judge’s conclusion that the specification does not disclose supporting the handguard . . . completely with a barrel nut.”).

While the specification does not disclose a handguard accessory completely supported by the barrel nut, the district court properly construed claims 31-36 as covering such a design. To construe the claims otherwise would ignore the plain meaning of the “words of the claims themselves.” A comparison between claims 31-36 and the other claims in the ’465 patent (i.e., claims 1-30) clearly indicates that the inventor, Mr. Swan, intended for claims 31-36 to cover a handguard accessory completely supported by a single attachment point at the barrel nut.

Specifically, claims 1-29 explicitly require two attachment points: one at the receiver sleeve and the other at the barrel nut. Claim 30 explicitly requires a receiver sleeve attachment point and provides great detail regarding a “supporting element.” Claims 31-36, however, added on reissue, mention nothing about a receiver sleeve attachment point. Instead, these claims disclose only a yoke/barrel nut attachment point that “support[s]” the upper handguard piece. That claims 1-30 contain a receiver sleeve limitation and claims 31-36 do not is telling, especially in an invention where the support points are such critical features. These “substantive differences” between claims “can be a useful guide in understanding the meaning of particular claim terms.” Here, the discrepancies between claims 1-30 and 31-36 strongly suggest that Mr. Swan did not want to import a receiver sleeve limitation into claims 31-36. Instead, he attempted through reissue to obtain claims covering a single-attachment design with the yoke/barrel nut attachment providing complete support.

We acknowledge that the specification is “always highly relevant to the claim construction analysis” and “is the single best guide to the meaning of a disputed term.” In this particular case,

however, construing claims 31-36 to only cover subject matter disclosed in the specification would involve permitting the receiver sleeve to provide support for the handguard accessory (in addition to the barrel nut). As explained, such a construction would eviscerate the plain meaning of claim language and ignore substantive differences between claims regarding an issue that is a focal point of the invention. Therefore, importing a receiver sleeve limitation into claims 31-36 is not appropriate.

Moreover, as noted above Atlantic Research argued at the Markman hearing that the handguard accessory is “supported by the barrel nut with or without the receiver sleeve” and that the receiver sleeve “could provide additional support but not necessary support.” In other words, Atlantic Research sought a claim construction in district court that would cover a barrel nut-only design, perhaps to support its infringement arguments against the accused products (the accused products undisputedly attach to and receive support from only the barrel nut). Now, however, having lost on written description grounds, Atlantic Research argues for a construction that precludes the barrel nut-only attachment design. We view such tactics with “extreme disfavor.” While we do not address whether Atlantic Research is judicially estopped from asserting contradictory claim construction arguments on appeal, we note that these inconsistencies undermine Atlantic Research’s current claim construction argument.

We must now incorporate the barrel nut-only claim construction into the written description analysis. As mentioned, it is undisputed that the written description for the ’465 patent does not disclose to a person of ordinary skill in the art an invention where the yoke/barrel nut attachment point provides complete support for the handguard accessory. . . . Claims 31-36, however, clearly cover such a design. Put differently, claims 31-36 exceed in scope the subject matter that inventor Mr. Swan chose to disclose to the public in the written description. Therefore, we hold that the district court properly granted summary judgment invalidating claims 31-36 for failing to satisfy the written description requirement of 35 U.S.C. § 112. Mr. Swan used the reissue process to impermissibly obtain claims unsupported by the written description. . . .

Our holding is also reinforced by the fact that Mr. Swan viewed his barrel nut-only attachment design as a trade secret when he filed the patent application containing the disclosures that he later relied upon for his reissue claims, as illustrated by the positions taken by Atlantic Research throughout the trade secret portion of the case . . . Specifically, Mr. Swan relied on the ’245 patent specification for the reissue claims in the ’465 patent. The specifications of both patents, with the exception of the claims, are nearly identical. When Mr. Swan filed the application that led to the ’245 patent, he was keeping the barrel nut-only attachment design from the public as a trade secret. Indeed, Atlantic Research contended at trial, as it had to in order to succeed on its trade secret claim, that the barrel nut-only attachment design was not disclosed in the ’245 patent. Mr. Swan cannot now “have it both ways” by reaching back and relying on the disclosures in the ’245 patent to claim an invention he was purposely shielding from the public.

NOTES AND QUESTIONS

1. *Possession Test.* The “possession” test has a long history and is linguistically pliable enough to support either the new matter policing role for written description, or a standalone role for the doctrine. For example, the Federal Circuit has suggested that disclosure of function or a result would not necessarily meet the written description requirement without disclosing a correlation between the function and some structure. Further, the case law suggests a

requirement for specificity of disclosure for the structure, even for originally filed claims, and without enablement's undue experimentation proviso.

2. In March 2010, the Federal Circuit issued an en banc opinion confirming the standalone role for the written description doctrine. *Ariad Pharm.* In the opinion, the court commented at length on the "possession test":

The term "possession," however, has never been very enlightening. It implies that as long as one can produce records documenting a written description of a claimed invention, one can show possession. But the hallmark of written description is disclosure. Thus, "possession as shown in the disclosure" is a more complete formulation. Yet whatever the specific articulation, the test requires an objective inquiry into the four corners of the specification from the perspective of a person of ordinary skill in the art. Based on that inquiry, the specification must describe an invention understandable to that skilled artisan and show that the inventor actually invented the invention claimed.

This inquiry, as we have long held, is a question of fact. Thus, we have recognized that determining whether a patent complies with the written description requirement will necessarily vary depending on the context. Specifically, the level of detail required to satisfy the written description requirement varies depending on the nature and scope of the claims and on the complexity and predictability of the relevant technology. For generic claims, we have set forth a number of factors for evaluating the adequacy of the disclosure, including "the existing knowledge in the particular field, the extent and content of the prior art, the maturity of the science or technology, [and] the predictability of the aspect at issue."

The law must be applied to each invention at the time it enters the patent process, for each patented advance has a novel relationship with the state of the art from which it emerges. Thus, we do not try here to predict and adjudicate all the factual scenarios to which the written description requirement could be applied. Nor do we set out any bright-line rules governing, for example, the number of species that must be disclosed to describe a genus claim, as this number necessarily changes with each invention, and it changes with progress in a field. Thus, whatever inconsistencies may appear to some to exist in the application of the law, those inconsistencies rest not with the legal standard but with the different facts and arguments presented to the courts.

There are, however, a few broad principles that hold true across all cases. We have made clear that the written description requirement does not demand either examples or an actual reduction to practice; a constructive reduction to practice that in a definite way identifies the claimed invention can satisfy the written description requirement. Conversely, we have repeatedly stated that actual “possession” or reduction to practice outside of the specification is not enough. Rather, as stated above, it is the specification itself that must demonstrate possession. And while the description requirement does not demand any particular form of disclosure, or that the specification recite the claimed invention in haec verba, a description that merely renders the invention obvious does not satisfy the requirement.

[Additionally, the court described that written description was not “super enablement” and described some of the possible differences between the two doctrines, while acknowledging that they will “often rise and fall together.”]

Ariad Pharm., Inc. v. Eli Lilly & Co., 598 F.3d 1336, 1351-54 (Fed. Cir. 2010).

3. *Reissue*. In *Atlantic Research v. Troy*, the inventor, Mr. Shaw, asserts a “reissue” patent. Reissue is a process available to the patent owner after the patent has issued. It is a procedure, mostly unchanged after the AIA, that allows a patent owner to correct “errors” in a patent. Errors in this context do not mean only ministerial problems, but can include not claiming the full scope of the invention. Thus, a reissue proceeding, if filed within two years of the patent issue date, can broaden the claims or add new claims (but not beyond the support given by the disclosure without putting doctrines such as enablement or written description in play). Mr. Swan’s originally issued patent, the ’245 patent, had 10 claims and issued in December 2002. The reissue patent, ’465, had 36 claims, issued in January 2007, and included those claims invalidated by the court for failing to meet the written description requirement.

§ 6.04 Adieu Best Mode?

Little remains of the best mode requirement after the AIA. As a longstanding feature of U.S. patent law, the pre-AIA best mode requirement was unique in at least two ways. First, it was a feature of U.S. patent law that made our law an outlier among the patent systems of the world. Second, the best mode requirement was unique within U.S. patent law because whether the inventor had a “best mode” is a subjective inquiry. One would ask: did the inventor have a mental belief that there was a “best” way to practice the invention? This subjective inquiry is in contrast to the POSITA’s objective perspective with which the other requirements for patentability are evaluated.

Some believed that the best mode was oftentimes a trap for the unwary and served little additional purpose on top of the other disclosure requirements. Leading up to the AIA’s enactment, many believed that eliminating the best mode requirement would benefit the patent system. However, the elimination was implemented in an awkward way: the best mode requirement remained in section 112, but was eliminated for use as a defense in section 282. Thus, patent applicants must still disclose a best mode, but there is virtually no practical enforcement of the requirement. One commenter appraised the situation as follows:

The legislative history provides no explanation for Congress’s failure to simply repeal the best-mode requirement entirely. Nor is one apparent.

Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part II of II*, 21 FED. CIR. B.J. 580, 584 (2012).

Those opposing removal of best mode from the U.S. patent system would sometimes cite the idea that its requirement would force disclosure of some of the trade secrets potentially associated with the invention. The patent instrument, however, can oftentimes omit many important secrets from disclosure because it must only enable and describe a prototype. The cases show a consistent stance against expanding the disclosure requirements to force manufacturing or production information from the patentee. This means, practically, that often a patent owner can keep as a trade secret some of the more useful commercial information related to scaling production to mass-market quantities or overcoming other manufacturing challenges. Should the disclosure requirements allow such a “loophole”? Is it unfair to call it a loophole when the claims do not cover those practical aspects of manufacturing the apparatus recited by the claim?

PROBLEMS

~~Alpha owns the '123 patent where claim 1 is: a cleaning fluid comprising: (a) 5–15% hydroxide detergent; (b) 2–10% scrubbing bubble facilitator fluid (SBFF); (c) an effective amount of mixing agent; and (d) balance water. The inventor is Smith, an employee of Alpha. This problem will model claim 1's four limitations symbolically as ABCD. An embodiment of claim 1 will implement actual percentages for all four limitations within the range for each limitation, and POSITAs understand that the sum will equal one hundred percent. For this set, any facts stated in a particular problem apply in all problems.~~

~~1. POSITAs are familiar with mixing agents for hydroxide detergent based cleaning fluids. Such mixing agents are easy to figure into a composition. The only mentions in the '123 patent specification about the mixing agent are that the most effective cleaning action occurred around 5%, that the JohnsonReMix agent was ineffective at all plausible percentages, and that some mixing agent was absolutely necessary. It turns out, however, that Alpha did not understand how to use JohnsonReMix; their directions in the specification incorrectly say how to use it. Beta makes and sells a first accused infringing product (accused device₁) that clearly has A, B, and D. For the mixing agent, accused device₁ uses the JohnsonReMix product at 6% because Beta understood the proper way to use JohnsonReMix. Proffer a claim construction on behalf of Beta for limitation C in claim 1 with the objective of avoiding infringement with accused device₁. What might Alpha's claim construction be in response? Assess Beta's ability to prevail on a definiteness or enablement challenge for limitation C.~~

~~2. No POSITA has ever heard of the term “scrubbing bubble facilitator fluid.” Alpha's factory discharges numerous types of foaming agents in varying quantities into a big vat for pickup each week. Within the factory it uses several dozen foaming agents. Smith simply takes material from the big vat as his SBFF to make the claim 1 cleaning fluid. POSITAs know how to use individual foaming agents, but do not know how to combine them. The '123 patent specification does not discuss foaming agents nor does it give any details about SBFF. Assess Beta's ability to prevail on a definiteness or enablement challenge for limitation B.~~

~~3. About 13 months after filing, while the '123 application was still before the PTO, Alpha added independent claim 2 to ABD. In other words, claim 2 is claim 1 rewritten to eliminate limitation C. In the United States, Beta makes and sells cleaning fluid accused device₃, that is an~~