

B.3 Infringement

3.1c DIRECT INFRINGEMENT UNDER THE DOCTRINE OF EQUIVALENTS

[This instruction should only be given where the patentee asserts infringement under the doctrine of equivalents.]

If a [person] [company] makes, uses, sells, offers to sell within, or imports into the United States a [product] [process] that does not literally meet all of the elements of a claim and thus does not literally infringe that claim, there can still be direct infringement if that [product or process] satisfies that claim elements “under the doctrine of equivalents.”

Under the doctrine of equivalents, a [product or process] infringes a claim if the accused [product or process] [contains elements or performs steps] that literally meet or are equivalent to each and every element of the claim. You may find that an element or step is equivalent to an element of a claim that is not met literally if a person having ordinary skill in the field of technology of the patent would have considered the differences between them to be “insubstantial” or would have found that the [structure or action]: (1) performs substantially the same function and (2) works in substantially the same way (3) to achieve substantially the same result as the element of the claim. In order to prove infringement by “equivalents,” [patent holder] must prove the equivalency of the [structure or action] to the claim element by a preponderance of the evidence. Thus, each element of a claim must be met by the [accused product or process] either literally or under the doctrine of equivalents for you to find infringement.

Known interchangeability of the claim element and the proposed equivalent is a factor that can support a finding of infringement under the doctrine of equivalents. In order for the [structure or action] to be considered interchangeable, the [claim element] must have been known at the time of the alleged infringement to a person having ordinary skill in the field of technology of the patent. Interchangeability at the present time is not sufficient.

If claims with means-plus-function clauses are at issue:

When the claim element that is not literally met by the [product or process] is a [“means-plus-function” or “step-plus-function”] element, and if you determined that there is no “literal infringement” because there is no [structure or set of structures/action or set of actions] in the [product or process] that performs the identical function of the means-plus-function element, you may decide that the [structure or action] nonetheless corresponds to the element of the claim under the doctrine of equivalents if it performs an “equivalent” function and has an “equivalent” [structure or action].

On the other hand, if you find that the accused [product or process] does not have identical or equivalent [structure or set of structures/action or set of actions] to [any of] the [set(s) of] [structure(s) or action(s)] that I defined as performing that function in the [] patent, then you may only find infringement under the doctrine of equivalents if the [structure or set of structures/action or set of actions] did not exist at the time the patent issued.

Authorities

Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722 (2002); *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 609 (1950) (explaining what constitutes an “equivalent”); *UCB, Inc. v. Watson Labs. Inc.*, 927 F.3d 1272, 1286 (Fed. Cir. 2019) (discussing known interchangeability in affirming infringement finding); *Mylan Institutional LLC v. Aurobindo Pharma Ltd.*, 857 F.3d 858, 866-70 (Fed. Cir. 2017) (discussing insubstantial differences and function-way-result tests); *Ring & Pinion Serv. Inc. v. ARB Corp.*, 743 F.3d 831, 831 (Fed. Cir. 2014) (explaining “an after-arising technology, a technology that did not exist at the time of patenting, can be found to be an equivalent under the doctrine of equivalents even though it cannot be an equivalent under the literal infringement analysis of § 112(f)”); *id.* at 834 (“known interchangeability weighs in favor of finding infringement under the doctrine of equivalents”); *Interactive Pictures Corp. v. Infinite Pictures Inc.*, 274 F.3d 1371, 1381-82 (Fed. Cir. 2001); *Johnson & Johnston Assocs. v. R.E. Serv. Co.*, 285 F.3d 1046 (Fed. Cir. 2002) (no infringement under the doctrine of equivalents); *Al-Site Corp. v. VSI Int’l, Inc.*, 174 F.3d 1308, 1320 (Fed. Cir. 1999) (distinguishing between the doctrine of equivalents and the statutory term “equivalents”); *Hughes Aircraft Co. v. United States*, 140 F.3d 1470, 1475 (Fed. Cir. 1998); *Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1480 (Fed. Cir. 1998); *Dolly, Inc. v. Spalding & Evenflo Cos.*, 16 F.3d 394, 397 (Fed. Cir. 1994).