
**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

NTP, INC.,

Plaintiff-Appellee

v.

RESEARCH IN MOTION, LTD.

Defendant-Appellant.

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US COURT OF APPEALS
FEDERAL CIRCUIT

**Appeal from the United States District Court
for the Eastern District of Virginia in 01-CV-767,
Judge James R. Spencer**

**PLAINTIFF-APPELLEE NTP'S CONSOLIDATED RESPONSE IN
OPPOSITION TO *AMICUS CURAIE* BRIEFS**

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August 31, 2005

CERTIFICATE OF INTEREST

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

 NTP, INC. v. RESEARCH IN MOTION, LTD.

No. 03-1615

Counsel for the Plaintiff/Appellee NTP, INC certifies the following:

1. The full name of every party or amicus represented by me is:

 NTP, INC.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

 NTP, INC.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

 NONE

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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Plaintiff-Appellee NTP, Inc. submits this consolidated response to the briefs *amicus curiae* filed in support of RIM's rehearing petition by the Government of Canada, Microsoft, the Canadian Chamber of Commerce, the Information Technology Association of Canada and Seven Networks, Inc. As shown on Figure 1 in the Appendix, virtually all of these *amici* have a direct financial connection or other close relationship to RIM or its counsel.

I. No *Amici* Disputes That The Claims Of The '592 Patent Do Not Include The "Interface" Limitation That Allegedly Gives Rise To The Issue Of Territoriality.

The accused BlackBerry system is composed of a group of components: desktop computers, electronic mail systems, special BlackBerry redirector software, BlackBerry handheld units, the BlackBerry Relay (the "interface" or "interface switch" as described in certain patents at issue), and RF networks. The "territorial" arguments raised in the *amicus curiae* briefs all are based on the fact RIM has chosen to locate the relay in Canada. None of the *amici* disputes that all of the other components of the accused BlackBerry system are and must be located in the United States to be made available for use by RIM's U.S. customers. Nor can they dispute that all of the relevant users of the BlackBerry system in this case (a) are located in the United States, (b) purchase BlackBerry handheld units in the United States, (c) purchase and install RIM's redirector software on their electronic mail systems physically located in the United States, and (d) use the systems, as promoted by RIM, to send email messages that are originated and received within the United States.

As the Panel decision correctly points out, "[t]he Relay component is alleged to meet the 'interface' or the 'interface switch' limitation in the '960, '670, '172, and '451 patents." Op. at 50. The '592 patent, however, contains no such claim limitation, and the argument advanced by RIM and its *amici* "based on the location of its Relay outside the United States does not apply to the asserted claims of the '592

patent (claims 40, 150, 278, 287, 653 and 654) because those claims do not include the ‘interface’ or ‘interface switch’ limitation.” *Id.* (emphasis added). Accordingly, there is no basis to delay issuance of this Court’s mandate with respect to the infringed claims of the ‘592 patent. Those claims should be returned immediately to the District Court for enforcement proceedings. *See, e.g., Barnes v. United States*, 678 F.2d 10 (3d Cir. 1982)(appellate court can act on part of an appeal while retaining jurisdiction over other portions); *Vining v. Enterprise Financial Group, Inc.*, 148 F.3d 1206, 1210 n.1 (10th Cir. 1998) (issuing partial mandate, forthwith, on certain issues although retaining jurisdiction over other issues).

II. The Canadian Government’s Brief Confirms That U.S. Patent Law Properly Applies When The RIM System Is Used “Within The United States.”

The Canadian government’s *amicus* brief expressly acknowledges that “national jurisdiction over trans-border technology may be justifiable under internationally accepted theories of national jurisdiction” (Br. 3-4). One such internationally accepted theory was applied by the Panel in affirming liability under the system claims for “uses ... within the United States” of the patented Campana systems. *Op.* at 55-57.

The recent decision of the United Kingdom Court of Appeal in *Menashe Business Mercantile, Ltd. v. William Hill Org., Ltd.*,¹ a decision that is considered “persuasive authority” in Canada, is directly on point. *Menashe* considered the location of “use” of a “claimed gaming system” in which the complete “host computer” for the system was located outside the United Kingdom but “punters” were enabled by connection to gamble within the United Kingdom. The United Kingdom Court of Appeal reached the identical conclusion of jurisdictional

¹ [2002] EWCA Civ. 1702, [2003] 1 All ER 279, [2003] 1 WLR 1462, [2003] LLR 275. A copy of the *Menashe* decision is reproduced in the Appendix.

infringement, for the identical reason of use by the customers, as did the unanimous Panel decision in this case – *i.e.*, “use” of the patented invention takes place at the place where the customer is located and the customer “will use the claimed gaming system in the United Kingdom, even if the host computer is situated in, say, Antigua.” *Id.*, ¶¶ 32-34.

The *Menashe* infringer put forward the same border-straddling, loophole, alleged need for different claim drafting, and “uncertainty” arguments as are advanced by RIM and its *amici* here. *See id.*, ¶¶ 17-20. The United Kingdom Court of Appeal readily rejected these contentions. The identity of reasoning between *Menashe* and the Panel decision confirms that the Panel decision is entirely in accord with established international norms for evaluating the place of infringement. *Menashe* and the Panel both reached the same common-sense conclusion that “use” occurs where the users employ the patented system and, in *Menashe*’s words, “[i]t is of no relevance to him, the user, nor the patentee as to whether or not [the host computer] is situated in the United Kingdom.” *Id.* at ¶ 32.

The Canadian government’s brief does not discuss the *Menashe* decision, nor does it directly dispute the Panel’s application of U.S. Patent law to “uses” of the patented Campana systems occurring “within the United States.”² Although the brief makes conclusory reference to “international understandings and agreements,” it never identifies any alleged inconsistency or conflict between the Panel’s “uses ... within the United States” analysis and the specific provisions of any such treaty or agreement. Moreover, as in *Decca*, the location of the Relay in Canada is at RIM’s discretion and the Relay could equally be located in the United States or in any other nation with sufficient communications links to the United States. Thus, apart from its

² As the Panel correctly noted, “the jury found that RIM’s customers are direct infringers of the patented system, and RIM has not appealed the determination that the customers are directly putting into action the system that is the subject of NTP’s claim limitations.” *Op.* 56 n. 13.

protective interest in RIM,³ Canada has shown no particularized sovereign interest in the Panel's decision. *See Decca Ltd. v. United States*, 544 F.2d 1070, 1082-83 (Ct. Cl. 1976).

Not surprisingly, the Canadian government's brief does not raise any specific substantive objection to the Panel's decision concerning "use" infringement of the patented system claims within the United States. Instead, it requests a lengthy *en banc* rehearing proceeding merely to have this Court issue an abstract advisory opinion that includes further discussion of general principles of international comity. This is not an appropriate use of this Court's resources, and will unfairly prejudice NTP by delaying, perhaps for years, enforcement of the fully affirmed system claims. As with the claims of the '592 patent, there is no basis to delay issuance of the Court's mandate with respect to the system claims, *i.e.*, claim 15 of the '960 patent, claim 8 of the '670 patent, and claims 28 and 248 of the '457 patent.

III. Microsoft's *Amicus* Brief Provides Additional Support For The Panel's Decision Affirming Infringement Of The System Claims.

As discussed in detail in NTP's contemporaneously filed Response In Opposition to RIM's rehearing petition, the Panel's decision affirming infringement of the Campana system claims based upon the undisputed "uses" of the accused BlackBerry system "within the United States" is entirely correct and, indeed, compelled by longstanding Supreme Court precedent. *Bauer & Cie v. O'Donnell*, 229 U.S. 1, 10-11 (U.S. 1913) ("use" of a patented invention is a "comprehensive term and embraces within its meaning the right to put into service any given invention"). Microsoft's *amicus* brief (p. 9) accurately articulates the underlying policy considerations in this regard.

³ The government of Canada admittedly has a \$34,000,000 (CDN) direct investment in RIM and obtains substantial tax revenues each year based on RIM's revenues from its U.S. customers, which currently amount to some \$ 1 billion (US) annually.

The NTP opinion held that, under section 271(a), the creation and location of one claim element of a claimed system outside the United States does not exculpate a domestic user of the system from infringement of a U.S. patent. Had RIM's counter-argument prevailed, however, it would have created an incentive for American companies to locate certain aspects of their system outside the United States, primarily to avoid infringement liability. Such an outcome would likely result in loss of jobs, skilled workers, capital, and information technology, abroad.

Thus, Microsoft's brief confirms that there is no basis for rehearing of the Panel's decision affirming infringement of the system claims.

Microsoft's additional argument suggesting rehearing of other issues concerning application of Sections 271(f) and (g) to the Campana method claims is without legal basis. NTP, not RIM, is the only party adversely affected by the Panel's decision regarding the method claims. NTP has not cross-petitioned for rehearing regarding the method claims, because the judgment below, including both monetary and injunctive relief, is fully supported by the affirmed claims of the '592 patent and the affirmed system claims in the '960, '670 and '451 patents.⁴

IV. The Canadian Chamber Of Commerce *Amicus* Brief Misstates The Facts And The Panel's Decision And Seeks An Improper Advisory Opinion.

The *amicus* brief of the Canadian Chamber of Commerce, in which RIM is one of the largest members, misstates the Panel's decisions regarding the Campana system claims. According to the Canadian Chamber (Br. 2), the Panel decided whether "an infringing use of a claimed [system] invention can occur when a portion of the accused infringer's activity occurs outside the United States." This

⁴ To the extent the Court believes further consideration of the Panel's decision regarding the application of Sections 271(f) and (g) to the Campana method claims is desirable, that issue – and only that issue – should be reheard, and the Court's mandate regarding the claims of the '592 patent and the system claims should issue forthwith.

mischaracterization ignores the undisputed factual record and distorts the Panel's analysis.

The Panel held that the jury properly found that RIM's U.S. customers who purchase RIM's BlackBerry products and software in the United States, install that software onto email systems located in the United States, and then use the configured system with the BlackBerry handheld units to send email messages that are originated and received within the United States, are direct infringers. Op. at 56, n. 13. Thus, the "use" of the BlackBerry system by RIM's U.S. customer's – *i.e.*, the "putting into service" of the system as a whole – occurs within the United States and is properly subject to U.S. law.⁵ By the same token, use of the accused BlackBerry system by RIM's U.K. customers occurs in the U.K. and is subject to U.K. patent law, even though messages sent from the U.K. are automatically routed through the Canadian Relay before receipt in the U.K. *See Menashe, supra*. Indeed, in each of the more than 23 other countries in which RIM markets and sells its accused BlackBerry system, "use" of the system by RIM's customers occurs within each such country's national boundaries and is subject to the intellectual property law of each such jurisdiction. Contrary to the Canadian Chamber's suggestion, there is no conflict or lack of comity in this regime. Each country may assert jurisdiction over uses of the system by customers located within its national borders.

The additional argument in the Canadian Chamber's *amicus* brief (pp. 4-5) urging the Court to grant rehearing in order to address extraterritorial issues concerning "product-by-process" claims is baseless. There are no "product-by-process" claims at issue in this case. This Court does not sit to issue abstract advisory

⁵ As discussed in NTP's Response In Opposition to RIM's rehearing petition, RIM's U.S. customers do not know, nor do they care, that their email messages are routed out of the country for a few milliseconds before they are immediately and automatically routed back to the United States for broadcast over U.S.-based RF networks to a BlackBerry handheld unit in the United States.

opinions attempting to reconcile the entire body of existing patent law unrelated to the specific facts actually before it.⁶

V. The ITAC *Amicus* Brief, Prepared By RIM’s Patent Firm, Merely Rehashes The Arguments In RIM’s Petition.

RIM is one of the largest, if not the largest, members of the Information Technology Association of Canada (“ITAC”). The ITAC’s *amicus* brief was prepared by the same attorneys at Kirkland & Ellis who directly represent RIM in another patent appellate proceeding currently pending before this Court.⁷ The filing of an *amicus* brief by RIM’s local trade association prepared by counsel otherwise representing RIM contravenes the spirit of the Federal Rules and effectively allows RIM to double the normal page limitation. The arguments in ITAC’s brief are not substantially different from those of RIM and its other *amici*.

1. ITAC’s assertion (Br. 3) that “there is no reasonable basis for the Panel’s inconsistent treatment of method and system claims” does not justify rehearing of the Panel’s decision affirming “use” infringement of the Campana system claims by RIM’s U.S. customers. That portion of the Panel’s decision applied longstanding Supreme Court and Court of Claims precedent to the undisputed factual record in this case concerning the purchase of BlackBerry products and software and the use of the accused BlackBerry system within the United States by RIM’s U.S. customers. To be sure, the Panel’s further announcement of a new rule requiring each step of a method claim to be performed within the United States was unprecedented and may be open to question. RIM, however, is not aggrieved by the Panel’s method claim

⁶ The rest of the Canadian Chamber’s arguments merely rehash RIM’s arguments regarding *Deepsouth* and *Decca* that were fully and correctly addressed in the Panel’s decision and discussed in NTP’s Response In Opposition to RIM’s rehearing petition. The alleged conflict between *Deepsouth* and *Decca* ignores the reconciliation of these cases in the *Decca* opinion. See 544 F.2d at 1082 - 83.

⁷ *Impro II Licensing v. T-Mobile USA, Inc., Research In Motion Corp., and Research In Motion, Ltd.*, Fed. Cir. Dkt. No. 05-1233.

pronouncements and NTP has not cross-petitioned on this issue because the underlying judgment is fully supported by the affirmed claims of the '592 patent and system claims.

2. The ITAC's "ownership" and "control" arguments (Br. 7-8) are irrelevant to use infringement of a patented system under Section 271(a). The "user" of a patented system is a direct infringer under 271(a) irrespective of whether it owns, leases or otherwise contracts to use the system as an operable whole. RIM currently receives \$ 1 billion a year from its U.S. customers for BlackBerry products and services that entitle the U.S. customers to use the entire BlackBerry system, including the Relay, to send email messages to and from points within the United States. By accepting payments from its U.S. customers, RIM guarantees them full authority to access the BlackBerry system for use in the United States.

3. ITAC, like other *amici*, makes conclusory assertions that the Panel's analysis of use infringement of system claims somehow "violates several multilateral and bilateral patent treaties and conventions" (Br. 9-10). Like the other *amici*, however, ITAC does not identify any specific conflict or inconsistency, nor does it address the U.K. Court of Appeal's *Menashe* decision confirming that exercise of national patent law jurisdiction over use of a patented trans-border system by users located within that jurisdiction is internationally recognized and accepted.

VI. The Seven Networks *Amicus* Brief Urges Creation Of A Lawless "No Mans Land" In Which Intellectual Property Pirates Can Misappropriate Patented Systems With Impunity.

Like the Canadian Chamber, the Seven Networks' *amicus* brief misstates the Panel's decision when it characterizes it as an "extension of 35 U.S.C. § 271(a) to hold a Canadian company directly liable for infringement in the United States when use of a patented system does not occur within the national borders of the United States" (Br. 8). To the contrary, the Panel decision holds that RIM's U.S. customers

commit acts of direct infringement under Section 271(a) when they “use” the accused BlackBerry system “within the United States” – which was the only issue that RIM appealed. *See Op.* at 51.⁸

Rather than focus on the issues actually presented on appeal, the Seven Networks’ *amicus* brief asks this Court to issue a broad advisory opinion declaring that there can never be any direct infringement of a system claim under Section 271(a) if “one component of a claim resides outside of the United States,” even though the system as a whole is made available to and used by customers within the United States. Such a ruling would contravene longstanding Supreme Court precedent and effectively destroy U.S. patent protection for computer and communications systems.

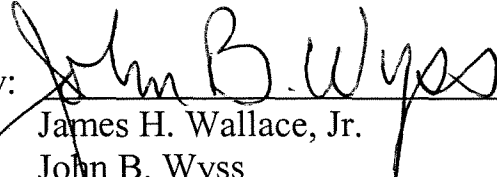
Under the rule advocated by RIM and Seven Networks, a competitor could copy a patented computer or communications system in every detail, but simply use the internet to transmit data to a point outside the United States for processing before returning the data to the U.S. for final system output/delivery. This would create a lawless “no mans land” in which neither the United States nor any other country could exercise jurisdiction. It would unleash a new class of transnational “pirates” who could commercially exploit other companies’ patented systems throughout the world, yet escape all liability by the simple expedient of straddling an international border with one system node.

As explained in *Decca*, infringement is a tortious act and infringement by “use” takes place where the benefit of the patented system is usurped without authority. 544 F.2d at 1082. Here, the Campana invention is being put to use in the United

⁸ RIM did not appeal the jury’s finding that its U.S. customers use its systems for transmitting email messages between points “within the United States,” nor did it appeal the jury’s findings that RIM induced and contributed to its U.S. customers direct infringement of the system claims.

States and “RIM has not appealed the determination that the customers are directly putting into action the system that is the subject of NTP’s claim limitations.” Op. at 56, n. 13. Thus, RIM stands before this Court as a would-be pirate whose international exploitation of U.S. commercial opportunities has sailed into U.S. jurisdictional waters. The Panel properly affirmed the jury’s determination that RIM must pay the price for its unlawful misappropriation of NTP’s property rights.

Respectfully submitted,

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APPENDIX

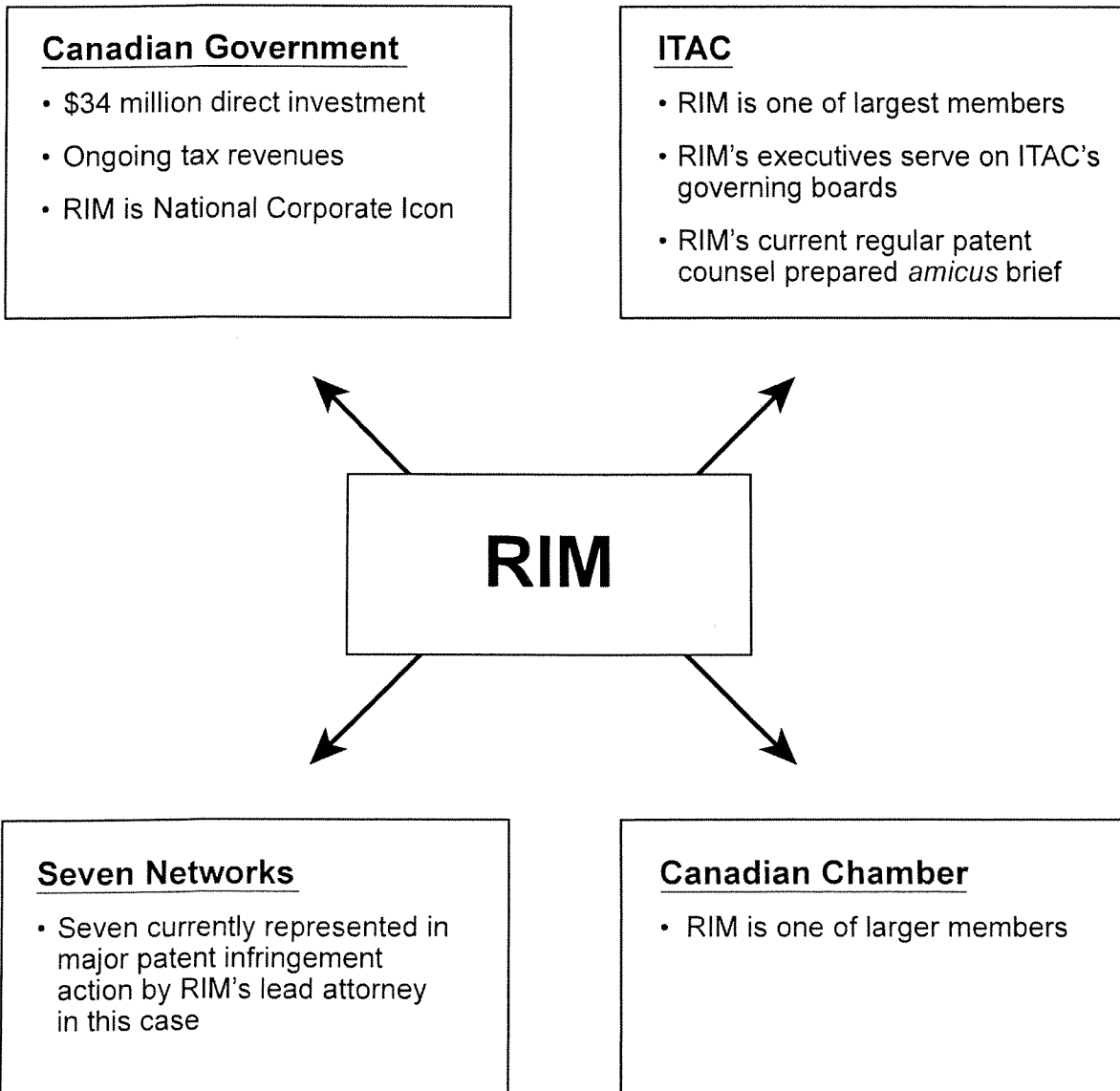


Figure 1

Menashe Business Mercantile Ltd and another v William Hill Organisation Ltd

COURT OF APPEAL (CIVIL DIVISION)

[2002] EWCA Civ 1702, [2003] 1 All ER 279, [2003] 1 WLR 1462, [2003] LLR 275

HEARING-DATES: 5, 28 November 2002

28 November 2002

CATCHWORDS:

Patents -- Infringement -- Indirect infringement -- Supplying in United Kingdom a person with any of the means relating to essential element of invention for putting invention into effect in United Kingdom -- Bookmakers supplying punter with computer program making punter's computer in United Kingdom a terminal for bookmakers' gaming system -- Bookmakers' host computer held abroad -- Whether effect rather than use in United Kingdom sufficient for purposes of indirect infringement -- Whether punter using gaming system in United Kingdom for purposes of indirect infringement -- Patents Act 1977, s 60(2).

HEADNOTE:

The claimant patentees were the proprietors of a patent registered in respect of a computerised interactive gaming system. The claims of the patent specified a host computer; at least one terminal computer which formed a player station; communication means for connecting the terminal computer to the host computer; and the program means for operating the terminal computer, the host computer and the communication means. The defendant bookmakers operated a gaming system available to punters in the United Kingdom who had a computer. Punters were supplied with a program, usually by compact disc (CD), which turned their computers into terminal computers communicating with a host computer. That host computer had the properties and carried out the functions of a host computer referred to in the claims, but was located outside the United Kingdom. In proceedings under s 60(2) (Section 60(2) is set out at [8], below) of the Patents Act 1977, the patentees alleged that the bookmakers had infringed their patent by supplying or offering to supply in the United Kingdom means relating to an essential element of the invention for putting it into effect when they knew, or it was obvious to a reasonable person in the circumstances, that those means were suitable for putting, and were intended 'to put, the invention into effect in the United Kingdom' within the meaning of s 60(2). On the hearing of a preliminary issue, the judge was required to determine whether, as the bookmakers contended, it was a defence to such a claim that the host computer and part of the communication means of the apparatus claimed in the patent, though connected to the rest of that apparatus, were not present in the United Kingdom. The judge concluded that there was no such defence, holding, *inter alia*, that the second reference to the United Kingdom in s 60(2) looked not to use within the United Kingdom, but to effect. The bookmakers appealed.

Held -- On its true construction, s 60(2) of the 1977 Act did not look to something which merely had an effect within the United Kingdom, but rather was concerned with means for implementing the invention. There was no basis for introducing into the definition of infringement that the supply of a means had to have an effect. Instead, it had to put something, namely the invention claimed in the patent, into effect. In the instant case, the claimed invention was an apparatus, and the words 'to put, the invention into effect' therefore required the means to be intended to put the apparatus claimed into effect. Thus the means- the CDs-had to be suitable for putting, and intended to put, the claimed apparatus in a state of effectiveness, essentially to put into an infringing state in the United Kingdom. It followed that the judge had erred in his construction of s 60(2). He had, however, answered the preliminary issue correctly even though his reasoning had not been correct. It was the input to, and output of, the host computer that was important to the punter, and in a real sense he used it in the United Kingdom even though it was situated, and operated, abroad. In those circumstances, it was not straining the word 'use' to conclude that the punter would use the claimed system in the

[2002] EWCA Civ 1702, [2003] 1 All ER 279, [2003] 1 WLR 1462, [2003] LLR

United Kingdom even if the host computer were situated abroad. Thus the supply of the CD in the United Kingdom to the United Kingdom punter would be intended to put the invention into effect in the United Kingdom within the meaning of s 60(2). Accordingly, the appeal would be dismissed (see [24], [27]-[29], [33]-[37], below).

Decision of Jacob J [2002] 3 All ER 597 affirmed on different grounds.

NOTES:

For indirect infringement, see 35 Halsbury's Laws (4th edn reissue) para 594.

For the Patents Act 1977, s 60, see 33 Halsbury's Statutes (4th edn) (2001 reissue) 209.

CASES-REF-TO:

Fort Dodge Animal Health Ltd v AKZO Nobel NV [1998] FSR 222, CA.

Plastus Kreativ AB v Minnesota Mining and Manufacturing Co [1995] RPC 438.

Cases referred to in skeleton arguments

Fujitsu Ltd's Patent Application [1997] RPC 608, CA.

Raleigh Cycle Co Ltd v H Miller & Co Ltd (1946) 63 RPC 113, CA; affd [1948] 1 All ER 308, HL.

INTRODUCTION:

Appeal

William Hill Organisation Ltd, the defendant to proceedings brought by the claimants, Menashe Business Mercantile Ltd and Dr Julian Menashe (collectively Menashe), for infringement of a patent registered in respect of an interactive computerised gaming system (European Patent (UK) No 0625760), appealed with permission of Jacob J from his decision on 15 March 2002 ([2002] EWHC 397 (Pat), [2002] 3 All ER 597), made on the determination of a preliminary issue, that it was not a defence to a claim under s 60(2) of the Patents Act 1977, if otherwise good, that the host computer claimed in the patent in suit was not present in the United Kingdom, but was connected to the rest of the apparatus claimed in the patent. The facts are set out in the judgment of Aldous LJ.

COUNSEL:

Richard Arnold QC and Benet Brandreth for William Hill; Peter Prescott QC and Lindsay Lane for Menashe.

JUDGMENT-READ:

Cur adv vult 28 November 2002. The following judgments were delivered.

PANEL: ALDOUS, DYSON LJ, SIR DENIS HENRY

JUDGMENTBY-1: ALDOUS LJ

JUDGMENT-1:

ALDOUS LJ: [1] Dr Julian Menashe is the registered proprietor of European Patent (UK) No 0625760 and Menashe Business Mercantile Ltd claims to hold an exclusive licence under the patent. I will refer to them collectively as Menashe.

[2] That patent relates to an invention entitled 'Interactive, computerised gaming system with remote control'. Claim 1, so far as relevant, claims --

'a gaming system for playing an interactive casino game comprising a host computer, at least one terminal computer forming a player station, communication means for connecting the terminal computer to the host computer and the program means for operating the terminal computer, the host computer and the communication means . . . characterised in that the terminal computer is situated at a location remote from the host computer . . .'

[2002] EWCA Civ 1702, [2003] 1 All ER 279, [2003] 1 WLR 1462, [2003] LLR

[3] On 26 October 2001 Menashe started proceedings against the William Hill Organisation Ltd for infringement of the patent. William Hill are the well-known bookmakers. In the particulars of infringement, Menashe alleged that William Hill had infringed by --

'supplying and/or offering to supply in the United Kingdom . . . means relating to an essential element of the invention for putting the invention into effect when the defendant [William Hill] knew at all material times and/or it was obvious to a reasonable person in the circumstances that the said means were suitable for putting and were intended to put the invention into effect in the United Kingdom.'

That is an allegation of infringement pursuant to s 60(2) of the Patents Act 1977.

[4] William Hill alleged that the patent was invalid. They admitted that a subsidiary was operating their gaming system alleged to infringe, but they denied that it fell within the scope of the claims of the patent. In para 7 of their defence they alleged that the gaming system did not have means relating to an essential element of the invention for putting that invention into effect in the United Kingdom. In essence they alleged that they did not infringe as the host computer was situated outside the United Kingdom in Antigua or Curacao.

[5] On 22 February 2002 William Hill applied for determination of a preliminary issue. The claimants accepted that it would be appropriate for a preliminary issue to be tried, but did not agree the terms of the question that had been put forward by William Hill. In the end the question ordered to be tried was:

'Is it a defence to the claim under s 60(2) of the Act, if otherwise good, that the host computer and the part of the communication means of the apparatus claimed in the patent are not present in the United Kingdom, but are connected to the rest of that apparatus?'

[6] That issue was tried upon agreed facts, namely that William Hill operate a gaming system available to punters in the United Kingdom who have a computer. The punters are supplied with a program usually by a CD which turns the punter's computer into a terminal computer which communicates via the Internet with a host computer. It has the properties and carries out the functions of a host computer referred to in the claims, but it is located outside the United Kingdom.

[7] That preliminary issue came before Jacob J ([2002] EWHC 397 (Pat), [2002] 3 All ER 597). In his judgment, he concluded that the preliminary issue should be answered in the negative and he so ordered. Against that conclusion and order William Hill appeal.

[8] The patent is a European patent, but is treated as if it was a national patent granted under the 1977 Act (see s 77). Section 61 of the Act enables the proprietor of the patent to bring proceedings in respect of any act alleged to have infringed the patent. Infringement is defined in s 60 in this way:

'(1) Subject to the provisions of this section, a person infringes a patent for an invention if, but only if, while the patent is in force, he does any of the following things in the United Kingdom in relation to the invention without the consent of the proprietor of the patent, that is to say-(a) where the invention is a product, he makes, disposes of, offers to dispose of, uses or imports the product or keeps it whether for disposal or otherwise; (b) where the invention is a process, he uses the process or he offers it for use in the United Kingdom when he knows, or it is obvious to a reasonable person in the circumstances, that its use there without the consent of the proprietor would be an infringement of the patent; (c) where the invention is a process, he disposes of, offers to dispose of, uses or imports any product obtained directly by means of that process or keeps any such product whether for disposal or otherwise.

'(2) Subject to the following provisions of this section, a person (other than the proprietor of the patent) also infringes a patent for an invention if, while the patent is in force and without the consent of the proprietor, he supplies or offers to supply in the United Kingdom a person other than a licensee or other person entitled to work the invention with any of the means, relating to an essential element of the invention, for putting the invention into effect when he knows, or it is obvious to a reasonable person in the circumstances, that those means are suitable for putting, and are intended to put, the invention into effect in the United Kingdom.

'(3) Subsection (2) above shall not apply to the supply or offer of a staple commercial product unless the supply or the offer is made for the purpose of inducing the person supplied or, as the case may be, the person to whom the offer is made to do an act which constitutes an infringement of the patent by virtue of subsection (1) above.'

[9] That section has to be read against the background of s 125 which provides:

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'(1) For the purposes of this Act an invention for a patent for which an application has been made or for which a patent has been granted shall, unless the context otherwise requires, be taken to be that specified in a claim of the specification of the application of the patent, as the case may be, as interpreted by the description and any drawings contained in that specification, and the extent of the protection conferred by a patent or application for a patent shall be determined accordingly . . .

'(3) The Protocol on Interpretation of Article 69 of the European Patent Convention (which Article contains a provision corresponding to subsection (1) above) shall, as for the time being in force, apply for the purposes of subsection (1) above as it applies for the purposes of that Article.'

[10] The Protocol on Interpretation is in these terms:

'Article 69 should not be interpreted in the sense that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claim. Neither should it be interpreted in the sense that the claim serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by persons skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties.'

[11] To complete the legislative background to the appeal it must be noted that s 130(7) of the 1977 Act declares that a number of sections in the 1977 Act, including s 60 --

'are so framed as to have, as nearly as practicable, the same effects in the United Kingdom as the corresponding provisions of the European Patent Convention [Convention on the Grant of European Patents 1978 (Munich, 5 October 1973; TS 20 (1978); Cmnd 7090) (EPC)], the Community Patent Convention [Convention for the European Patent for the Common Market (Luxembourg, 15 December 1975; EC 18 (1976); Cmnd 6553) (as amended by Council Agreement (EEC) 89/695) (OJ 1989 L401 pp 1-27) (CPC)] and the Patent Co-operation Treaty [Washington, 19 June 1970; TS 78 (1978); Cmnd 7340 (PCT)] have in the territories to which those Conventions apply.'

For the purposes of this appeal the relevant provisions are arts 25 and 26 of the CPC. They are in this form:

'Article 25

Prohibition of direct use of the invention

A Community patent shall confer on its proprietor the right to prevent all third parties not having his consent:

(a) from making, offering, putting on the market or using a product which is the subject-matter of the patent, or importing or stocking the product for these purposes;

(b) from using a process which is the subject-matter of the patent or, when the third party knows, or it is obvious in the circumstances, that the use of the process is prohibited without the consent of the proprietor of the patent, from offering the process for use within the territories of the Contracting States;

(c) from offering, putting on the market, using, or importing or stocking for these purposes the product obtained directly by a process which is the subject-matter of the patent.

Article 26

Prohibition of direct use of the invention

1. A Community patent shall also confer on its proprietor the right to prevent all third parties not having his consent from supplying or offering to supply within the territories of the Contracting States a person, other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting into effect therein, when the third party knows, or it is obvious in the circumstances, that these means are suitable and intended for putting that invention into effect.

2. Paragraph 1 shall not apply when the means are staple commercial products, except when the third party induces the person supplied to commit acts prohibited by Article 25.

3. Persons performing the acts referred to in Article 27(a) and (c) shall not be considered to be parties entitled to exploit the invention within the meaning of paragraph 1.'

[12] I will come to the detail of the submissions of the parties, but it is convenient at the outset to set out their basic positions.

[13] William Hill submitted that in order to ascertain whether 'the means' referred to in s 60(2) is intended to put the invention into effect, it is necessary to decide what the invention is. As s 125 states, the invention is that specified in the claims as interpreted by the description and the drawings. In the present case, the invention is the apparatus claimed in claim 1 which includes the terminal computers and the host computer. For there to be infringement, 'the means' must be intended to be combined in the United Kingdom with the other integers of the claimed apparatus thereby 'putting the invention into effect in the United Kingdom'. In essence, they submitted that because the host computer is outside the United Kingdom, the means, the CDs, are not supplied in circumstances where they 'are suitable for putting, and are intended to put, the invention into effect in the United Kingdom' as required by s 60(2) of the Act.

[14] Menashe submitted that the phrase 'for putting, and are intended to put, the invention into effect in the United Kingdom' does not require all the claimed parts of the apparatus to be in the United Kingdom. In the present case the punters and the terminal computers are in the United Kingdom. They are supplied with a CD which is a means relating to an essential element of the invention. It is supplied by William Hill with the requisite state of mind. The fact that the host computer is outside the United Kingdom does not mean that the invention is not put into effect in the United Kingdom.

THE JUDGMENT

[15] Having referred to the relevant legislative provisions, the judge set out the submissions of Mr Prescott QC, who appeared for Menashe, and Mr Carr QC, who appeared for William Hill. He accepted those of Mr Prescott. He said ([2002] 3 All ER 597 at [20]) that 'Any other result would be monstrous- allowing a defendant to use supposed cross-border problems to avoid infringement of a system anywhere'. His detailed reasons were threefold.

[16] The first was contained in para [21]:

First the double reference to the United Kingdom. Mr Carr overlooks the fact that the second reference (into effect in the United Kingdom) looks to effect within the United Kingdom not use within the United Kingdom. The fact that second reference ("therein") was added during the negotiations is understandable but irrelevant. All that did was to identify the territory within which the effect was to be identified-to make sure that both the supply of the essential means and its effect were within the same territory. Mr Prescott's second order point is telling-why speak of "putting invention into effect in the United Kingdom" if you simply meant "infringe the United Kingdom patent". I can see no purposive construction of the PCT which would make sense in this context.'

[17] The second upheld Mr Prescott's submission that William Hill's case, if right, produced an enormous hole in the internationally agreed rules for infringement. Mr Prescott's submission as recorded by the judge was:

'[11] Further says Mr Prescott, if he were wrong there would be an enormous hole in the internationally agreed rules for infringement. His skeleton argument demonstrates the hole in the following way: "Take the case of a someone who installs and sells a telecommunications apparatus which straddles the French-German border. Suppose the patent claim calls for integers A + B. Both are essential integers. But A is in France and B is in Germany. If the defendants are right, no infringement. We respectfully submit it obviously would be infringement-else it would offend common sense. That cannot be what the framers of the CPC intended. It is not purposive construction. We could give many other examples, and of great commercial and industrial importance. For instance, a constellation of satellites, not all passing over the United Kingdom at once, and a downlink here."

[18] Mr Carr's answer to that submission was set out (at [17]) by the judge:

'Mr Carr realised the force of Mr Prescott's "hole" point. He sought to answer it by saying that it was a hole which, if the claimant's agent had been more ingenious, could have been plugged. All the agent had to do was to insert separate claims to the terminal and the host computers. Mr Carr handed me claims for the terminal and host which, he said, would have done the job. They took the form: "A terminal (host) computer for using in a gaming system [then defined], the terminal computer comprising . . ." And he answered Mr Prescott's flourish by saying that in the case of the system claim the invention was not put into effect in any one country.'

[19] As to those submissions the judge concluded (at [22]):

Next, the hole. I do not think Mr Carr's answer is either rational or correct. The claimant's invention is in substance the combination of elements. It is the system. To say that a claim to the heart of the inventive concept would

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not suffice to provide protection is to suggest that patentees should play games with the patent system. Here the game is to pretend that the invention is a terminal when programmed whereas really the invention is a system. Moreover the argument is flawed. It is trite patent law that individual items of a combination may be old or obvious, yet the combination not.'

[20] The third reason dealt with Mr Carr's attack upon the submission of Mr Prescott, accepted by the judge (at [21]), that s 60(2) only required an effect within the United Kingdom:

'[24] Finally there is Mr Carr's "uncertainty" argument-that if "effect" meant any effect it was too vague. Mr Prescott shrewdly noticed a parallel with art 5(3) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (as set out in Sch 1 to the Civil Jurisdiction and Judgments Act 1982). This confers tort jurisdiction on a court in a member state where "the harmful event occurred". If anything that is a vaguer test than "effect" yet it has proved reasonably workable. In any event, just because there may be borderline cases of difficulty is no reason for not holding that an obvious case falls within the rule. No businessman would think for a moment that the effect of the invention is not within the United Kingdom when the whole point of the defendants' system is to get United Kingdom punters to play their system.'

[21] The crux of the judgment was the judge's conclusion (at [21]) that the words 'are suitable for putting, and are intended to put, the invention into effect in the United Kingdom' did not limit the means to that which was intended to put the invention into effect in the sense of put it into a state of effectiveness or use or being implemented, in the United Kingdom. The relevant words look 'to effect within the United Kingdom not use within the United Kingdom'.

THE APPEAL

[22] Mr Arnold QC who with Mr Brandreth appeared in this court for William Hill, submitted that s 60 of the 1977 Act was confined to acts committed within the United Kingdom. For support he relied upon the fact that patents are territorial in nature (see *Fort Dodge Animal Health Ltd v AKZO Nobel NV* [1998] FSR 222) and a passage in my judgment in *Plastus Kreativ AB v Minnesota Mining and Manufacturing Co* [1995] RPC 438 at 442:

'The power to make a declaration under section 71 of the 1977 Act is confined to acts within the United Kingdom. The acts referred to are the acts of infringement which are set out in section 60 of the Act. That section makes it clear that infringement only occurs if a person does an act within the United Kingdom without the consent of the proprietor.'

[23] What I said in the *Plastus Kreativ* case is, I believe, correct, but that statement does not help to resolve the dispute as to the true meaning of the words in the last half of s 60(2) and in particular the meaning of '. . . to put, the invention into effect in the United Kingdom'. It was directed at the first territorial limitation in s 60(2) and the only territorial limitation in s 60(1), as was the judgment in the *Fort Dodge* case.

[24] I believe that Mr Arnold is correct and that 'the invention' referred to in s 60(2) is that claimed in the patent (see s 125). In this case, as Mr Arnold pointed out, the claimed invention is an apparatus. If so, I believe he is right that the words 'to put, the invention into effect' must require the means to be intended to put the apparatus claimed into effect: thereby requiring the claimed apparatus to become effective. Thus the means, the CDs, must be suitable for putting and be intended to put the claimed apparatus in a state of effectiveness, essentially to put into an infringing state in the United Kingdom.

[25] That construction is supported by the purpose of s 60(2). It is intended to extend the right of a patentee to prevent what are called the direct infringing acts of s 60(1) to include also the indirect infringing acts of s 60(2). That is supported by the Records of the Luxembourg Conference on the Community Patent 1975 which shows that the word 'therein' in art 26(1) was inserted to clarify para 1 'to the effect that it was prohibited to offer or supply the means referred to for using the invention within the territories of the Contracting States'. Thus the committee contemplated that art 26(1) was concerned with means which were essential for the use of the invention and that both the supply of the means and the use should take place in the relevant territories. The construction proposed is also borne out by the headings to arts 25 and 26 which both state that the articles are concerned with 'Prohibition of . . . use of the invention'. If art 26(1) had been concerned with effect, then I would have expected the heading to that article to have been different to that in art 25.

[26] If there were doubts as to the purpose of art 26 some light is thrown upon it by the other language versions which suggest that the article is concerned with implementation not effect:

'French: "de mise en oeuvre, sur ce territoire, de cette invention";

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German: "zur Benutzung der Erfindung in diesem Gebiet";

Italian: "per utilizzarle, in tale territorio, l'invenzione";

Spanish: "para llevarla en efecto en dicho territorio";

Portuguese: "para executar, nesse territsrio, a referida invenco".¹

[27] Section 60(3) also suggests that s 60(2) is concerned with means for implementing the invention. This section removes from the ambit of s 60(2) the supply of a staple commercial product except where the supply is for the purpose of inducing an infringing act. Recourse to art 26(2) makes it clear that what is contemplated by use of the word 'infringement' in s 60(3) is a direct act of infringement, namely one falling within s 60(1). If so, it is likely that the draftsman believed that s 60(2) was concerned with means intended to put the invention into an infringing state. To construe s 60(2) so as to extend it to cases where an effect occurs would be inconsistent with that belief.

[28] I do not find the judge's reasons in para [21] (see [16], above) convincing. The reason why the draftsman adopted the words 'putting the invention into effect in the United Kingdom' was that those words were used in art 26. The word 'infringement' does not appear in arts 25 or 26. In my view the judge appears to have overlooked that s 60(2) is concerned with putting something, the invention, into effect. It does not look to something which merely has an effect within the United Kingdom.

[29] I do not consider it appropriate to introduce through s 60(2) the concept of infringement by supplying means which merely have an effect in the United Kingdom. As Mr Arnold pointed out, the effect could be economic, physical or perhaps in some cases, emotional. The judge's recourse to the Brussels Convention was not helpful as that is concerned with where the effect of an event is felt, whereas the judge's construction is concerned with the effect of an invention. Mr Prescott pressed into use the phrase a 'technical effect', whatever in this context that may be. There is in my view no basis for introducing into the definition of infringement that the supply of a s 60(2) means must have an effect. It must put something, namely the invention, into effect.

[30] I suspect that the reasoning of the judge was influenced, at least in part, by the hole that he envisaged that William Hill's construction made in a patentee's rights. He said it was monstrous to allow a defendant to use cross-border problems to avoid infringement. Mr Arnold accepted that on his argument in a case like the present, the patent would not be infringed in any country. That does produce a hole. However, he submitted that even if there was a hole in this case, it was not a hole which would appear with appropriately drafted claims. He submitted that claims could have been drafted that would have protected the inventive concept. He is of course right that the claims could have been drafted differently so as not to require both host and terminal computers, but that would only in part fill the hole.

[31] The judge's view that there was a hole was derived from the attitudes that the parties adopted before him. It seems that the parties accepted before the judge that if the words 'to put the invention into effect in the United Kingdom' meant 'to put the invention into effectiveness' in the sense of being suitable for use or being actually used, then there was no infringement. The reason being that the host computer was outside the United Kingdom. To my mind that conclusion does not follow from the fact and Mr Prescott in this court submitted that it did not.

[32] The claimed invention requires there to be a host computer. In the age that we live in, it does not matter where the host computer is situated. It could be in the United Kingdom, on a satellite, or even on the border between two countries. Its location is not important to the user of the invention nor to the claimed gaming system. In that respect, there is a real difference between the claimed gaming system and an ordinary machine. For my part I believe that it would be wrong to apply the old ideas of location to inventions of the type under consideration in this case. A person who is situated in the United Kingdom who obtains in the United Kingdom a CD and then uses his terminal to address a host computer is not bothered where the host computer is located. It is of no relevance to him, the user, nor the patentee as to whether or not it is situated in the United Kingdom.

[33] If the host computer is situated in Antigua and the terminal computer is in the United Kingdom, it is pertinent to ask who uses the claimed gaming system. The answer must be the punter. Where does he use it? There can be no doubt that he uses his terminal in the United Kingdom and it is not a misuse of language to say that he uses the host computer in the United Kingdom. It is the input to and output of the host computer that is important to the punter and in a real sense the punter uses the host computer in the United Kingdom even though it is situated in Antigua and operates in Antigua. In those circumstances it is not straining the word 'use' to conclude that the United Kingdom punter will use the claimed gaming system in the United Kingdom, even if the host computer is situated in, say, Antigua. Thus the

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supply of the CD in the United Kingdom to the United Kingdom punter will be intended to put the invention into effect in the United Kingdom.

[34] Mr Arnold put forward two reasons why such a construction of s 60(2) was not correct. First, he submitted that such a construction would mean that direct infringement by use would occur and that infringement by use had not been alleged. That may be because Menashe have no need to litigate against users, but in any case that submission does not provide a reason to reject the construction. Second, he reminded us that s 125 confined the invention to that which was claimed. In this case that included a host computer having certain functions and features. It was, he submitted, necessary that the host computer had to be in the United Kingdom, not the effect of it. I accept the premise of that submission, but not the result. A punter who uses the William Hill system will be using the whole system as if it was in the United Kingdom. He will in substance use the host computer in the United Kingdom, it being irrelevant to the punter where it is situated.

[35] I have reached the same answer to the preliminary question as the judge and for that reason I would dismiss the appeal. However I am conscious that the route to the answer is different.

JUDGMENTBY-2: DYSON LJ

JUDGMENT-2:

DYSON LJ: [36] I agree.

JUDGMENTBY-3: SIR DENIS HENRY

JUDGMENT-3:

SIR DENIS HENRY: [37] I also agree.

DISPOSITION:

Appeal dismissed. Permission to appeal refused.

SOLICITORS:

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I hereby certify that on this 31st day of August, 2005, I caused copies of the foregoing document to be served, as per agreement of Counsel, in the following manner:

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