

The opinion in support of the decision being entered today  
is **not** binding precedent of the Board.

Paper No. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte GILLES BAUDIN

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Appeal No. 2001-1042  
Application No. 09/292,334<sup>1</sup>

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HEARD: June 13, 2001

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Before FRANKFORT, BARRETT, and NASE, Administrative Patent  
Judges.

NASE, Administrative Patent Judge.

DECISION ON APPEAL

The application is on appeal from the final Office action  
mailed May 22, 2000 (Paper No. 7). The claims before us on  
appeal are claims 15 to 18 and the statutory basis for  
rejection is 35 U.S.C. § 251. Both parties are in agreement

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<sup>1</sup> Application filed April 15, 1999, for reissue of U.S.  
Patent No. 5,865,353 (Application No. 08/917,772, filed August  
27, 1997), which patent issued on February 2, 1999.

that the sole issue before us is whether the scope of reissue claims 15 to 18 is estopped under 35 U.S.C. § 251 (reissue recapture estoppel)(Appeal Brief<sup>2</sup>, page 4; Examiner's Answer<sup>3</sup>, page 2). Claims 1 to 14 have been allowed. No claim has been canceled.

We REVERSE.

#### FINDINGS

A review of the history of the examiner's actions and the appellant's responses reveals the following facts:

Activity in Application No. 08/917,772  
(now U.S. Patent No. 5,865,353)

1. On August 27, 1997, Application No. 08/917,772 was filed with 15 original claims. Original claim 1 read as follows:

A dispensing cap for a reservoir containing a liquid or viscous product, comprising:  
a rigid or semirigid body having at least one dispensing opening; and

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<sup>2</sup> Paper No. 14, filed November 7, 2000.

<sup>3</sup> Paper No. 15, mailed November 29, 2000.

a rigid or semirigid lid articulated to the body around an articulation axis so as to stopper the dispensing opening in a storage position of the lid, wherein a gripping zone formed of an elastomeric material is arranged on at least one of the lid and the body to facilitate opening and the closing of the lid.

2. On June 16, 1998, the first Office action by the examiner was mailed (Paper No. 6). In that Office action, the examiner rejected claims 1, 3, 8, 9, 11, 12 and 15 under 35 U.S.C. § 102(b) and claims 2, 4 to 7, 10, 13 and 14 under 35 U.S.C. § 103(a).

3. On September 11, 1998, the applicant responded to the examiner's first Office action by amending claims 1, 6 to 8 and 15 and canceling claim 13 (Paper No. 9). On page 4 of this response the applicant stated that as agreed during an interview held on August 11, 1999, the amended claims now recite features which "define over the prior art of record including Maquire et al, Imbery Jr., Ikeda et al, and von Schuckmann, none of which disclose a connecting element which is elongated along its length and passes in the region of the

articulation axis." In this response, claim 1 was amended<sup>4</sup> to read as follows:

A dispensing cap for a reservoir containing a liquid or viscous product, comprising:

a rigid or semirigid body having at least one dispensing opening; [and]

a rigid or semirigid lid articulated to the body around an articulation axis so as to stopper the dispensing opening in a storage position of the lid[,];  
and

at least one connecting element overmolded in a thermoplastic material, and elastically deformable in elongation along a length of the at least one connecting element to form a spring, one of the ends of the connecting element being connected to the body, the other end being connected to the lid, and the connecting element being mounted in such a way as to be situated on one side of the articulation axis in an open position and on the other side of the axis in a closed position of the lid; and wherein when the connecting element passes from one of the positions to the other, the at least one connecting element is subjected to an elongation whose maximum is reached when connecting element passes in the region of the articulation axis,

wherein a gripping zone formed of an elastomeric material is arranged on at least one of the lid and the body to facilitate opening and the closing of the lid.

4. On September 22, 1998, a Notice of Allowability was mailed indicating that "[a]ll claims being allowable,

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<sup>4</sup> Additions to original claim 1 have been shown by underlining and deletions from original claim 1 have been shown by brackets.

PROSECUTION ON THE MERITS IS (OR REMAINS) CLOSED in this application" and that the "allowed claims are 1-13 and 15 [sic, claims 1-12, 14 and 15]" (Paper No. 10).

5. On September 30, 1998, the applicant submitted a paper (Paper No. 12) entitled "Supplemental Amendment." This paper presented new claim 16 which read as follows:

A dispensing cap for a reservoir containing a liquid or viscous product, comprising:

a rigid or semirigid body having at least one dispensing opening; and

a rigid or semirigid lid articulated to the body around an articulation axis so as to stopper the dispensing opening in a storage position of the lid, the articulation is formed by a film hinge so that the body and the lid constitute one single piece,

wherein a gripping zone formed of an overmolded elastomeric material is arranged on at least one of the lid and the body to facilitate opening and the closing of the lid.

On page 2 of this paper the applicant argued that the prior art references of Monnet, Bolen, Jr. et al., Gach, Hazard, Maguire et al, Imbery Jr., Ikeda et al., and von Schuckmann lack the claimed structure of "a gripping zone formed of an overmolded elastomeric material is arranged on at least one of the lid and the body to facilitate opening and the closing of the lid," as recited in new claim 16. Additionally, on page 3

of this paper the applicant argued that the prior art references of Monnet, Bolen, Jr. et al., Gach, Maguire et al., Ikeda et al., and von Schuckmann lack "a film hinge so that the body and the lid constitute one single piece," as recited in new claim 16.

6. On February 2, 1999, Application No. 08/917,772 issued as U.S. Patent No. 5,865,353.

7. Also on February 2, 1999, the USPTO mailed a notice (Paper No. 13) that informed the applicant that the amendment received on September 30, 1998, had not been entered.

Activity in Reissue Application No. 09/292,334

8. On April 15, 1999, the applicant filed Reissue Application No. 09/292,334. This reissue application presented claims 1 to 14 of the patent without change and presented new claim 15 which read as follows:

A dispensing cap for a reservoir containing a liquid or viscous product, comprising: a rigid or semirigid body having at least one dispensing opening; and a rigid or

semirigid lid articulated to the body around an articulation axis so as to stopper the dispensing opening in a storage position of the lid, the articulation is formed by a film hinge so that the body and the lid constitute one single [sic, single] piece, wherein a gripping zone formed of an overmolded elastomeric material is arranged on at least one of the lid and the body to facilitate opening and the closing of the lid.

9. On July 6, 1999, the applicant filed a Reissue Declaration (Paper No. 3) asserting an error in "claiming more [sic, less] than I had a right to claim in the patent." The declaration provides in paragraph 8 that

A first error resulting my claiming more [sic, less] than I had a right to claim is the failure to include a claim reciting a dispensing cap for a reservoir containing a liquid or viscous product, comprising a rigid or semirigid body having at least one dispensing opening; and a rigid or semirigid lid articulated to the body around an articulation axis so as to stopper the dispensing opening in a storage position of the lid, the articulation is formed by a film hinge so that the body and the lid constitute one single piece, wherein a gripping zone formed of an overmolded elastomeric material is arranged on at least one of the lid and the body to facilitate opening and the closing of the lid.

10. On December 21, 1999, the examiner rejected claims 1 to 15 as based upon a defective reissue declaration under 35 U.S.C.

§ 251 and rejected claim 15 under the equitable "recapture" doctrine (35 U.S.C. § 251) (Paper No. 5). Claims 1 to 15 were also rejected under 35 U.S.C. § 103(a).

11. On March 21, 2000, the applicant filed an amendment which amended claim 15 and presented new claims 16 to 18 dependent on claim 15 (Paper No. 6). Claim 15 was amended<sup>5</sup> to read as follows:

A dispensing cap for a reservoir containing a liquid or viscous product, comprising:

a rigid or semirigid body having at least one dispensing opening; [and]

a rigid or semirigid lid articulated to the body around an articulation axis so as to stopper the dispensing opening in a storage position of the lid, the articulation is formed by a film hinge so that the body and the lid constitute one [single] single piece, wherein a gripping zone formed of an overmolded elastomeric material is arranged on at least one of the lid and the body to facilitate opening and the closing of the lid.

12. On May 22, 2000, the examiner finally rejected claims 15 to 18 under 35 U.S.C. § 251 "as being an improper recapture of

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<sup>5</sup> Additions to original reissue claim 15 have been shown by underlining and deletions from original reissue claim 15 have been shown by brackets.

claimed subject matter deliberately canceled in the application for patent upon which the present reissue is based" (Paper No. 7). Claims 1 to 14 were allowed.

13. On August 9, 2000, the applicant submitted a proposed amendment to claim 15 (Paper No. 8) which amendment was entered for purposes of appeal (See Paper No. 10). Claim 15 was amended<sup>6</sup> to read as follows:

A dispensing cap for a reservoir containing a liquid or viscous product, comprising:

a rigid or semirigid body having at least one dispensing opening; [and]

a rigid or semirigid lid articulated to the body around an articulation axis so as to stopper the dispensing opening in a storage position of the lid, the articulation is formed by a film hinge so that the body and the lid constitute one [single] single piece, wherein a gripping zone formed of [an overmolded] a bi-injected elastomeric material is arranged on at least one of the lid and the body to facilitate opening and the closing of the lid.

#### THE EXAMINER'S POSITION

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<sup>6</sup> Additions to original reissue claim 15 have been shown by underlining and deletions from original reissue claim 15 have been shown by brackets.

In the final rejection (page 3), the examiner's basis for the recapture rejection noted above is that the applicant surrendered the right to present claims which are broader in scope than patent claim 1 by limiting the patent claims to what is recited therein in order to overcome the prior art. Therefore, the examiner concludes that the applicant may not obtain by reissue any claim which omits any limitation set forth in patent claim 1.

The examiner believes (answer, pages 3-4) that the appellant's analysis that recapture does not apply in this case because reissue claim 15 is narrower in all respects than originally presented claim 1 does not apply to the present case. The examiner states that the reissue claims are broader in an aspect germane to a prior art rejection, but narrower in another aspect completely unrelated to the rejection. In that regard, the examiner notes that reissue claim 15 requires that the gripping zone be formed of a "bi-injected" elastomeric material. Patent claim 1 (as well as originally presented claim 1) required only that the gripping zone be formed of an elastomeric material. The examiner then concludes that

clearly this limitation with respect to the gripping zone is not barred by the recapture rule.

Next the examiner states that the recapture rule applies to this case with respect to the region of the device between the lid and the body. Reissue claim 15 states "the articulation is formed by a film hinge so that the body and the lid constitute one single piece". Patent claim 1 states

at least one connecting element overmolded in a thermoplastic material, and elastically deformable in elongation along a length of the at least one connecting element to form a spring, one of the ends of the connecting element being connected to the body, the other end being connected to the lid, and the connecting element being mounted in such a way as to be situated on one side of the articulation axis in an open position and on the other side of the axis in a closed position of the lid; and wherein when the connecting element passes from one of the positions to the other, the at least one connecting element is subjected to an elongation whose maximum is reached when connecting element passes in the region of the articulation axis.

The examiner concludes that clearly, reissue claim 15 is broader than patent claim 1 with respect to the region of the device between the lid and the body and accordingly that reissue claims 15-18 are broader in a way that attempts to reclaim subject matter that has been surrendered.

THE APPELLANT'S POSITION

The appellant states (brief, page 3) that reissue claim 15 includes all of the limitations of original application claim 1, as well as a further limitation concerning the articulation between the lid and the body, to wit: "the articulation is formed by a film hinge so that the body and the lid constitute one single piece." In addition, the appellant points out that reissue claim 15 further recites the new limitation that the gripping zone is formed of a "bi-injected" elastomeric material.

The appellant argues (brief, pages 4-6) that there can be no reissue recapture if the reissue claims are narrower in scope in all respects than claims canceled from the original application to obtain a patent. The appellant point outs that it is important to emphasize that this comparison is made between the reissue claims and those claims which were canceled in order to obtain a patent, and not between the reissue claims and the resulting patent claims.

PRECEDENT

Ex parte Feissel, 131 USPQ 252, 254 (Bd. App. 1960)

provides that

Upon careful consideration of the issues involved, we do not agree with the examiner as to the instant rejection. We do not have here before us a situation falling strictly within the general rule that where a claim in a first application is deliberately cancelled or restricted in response to a rejection thereof on prior art, the cancelled claim or a claim merely without the restrictive amendment that was added cannot be obtained in a reissue. Nor does the instant situation involve a claim in a reissue application which differs from that cancelled in the first application only in being broader, which would be barred as denoted in *In re Byers*, 43 CCPA 803, 109 USPQ 53, 230 F.2d 451, 1956 C.D. 183, 705 O.G. 444. Here, in the original application, the claim which was in effect first cancelled contained neither the amplifier limitation nor the further limitation referred to by the examiner, while the claim that was later cancelled contained only the amplifier limitation. There was no cancellation in that application of any claim of the scope of that here before us on appeal, namely, containing only said further limitation but not the amplifier limitation. Viewing the claims here involved in their entirety, as we must, rather than in their disjointed parts, it is apparent that claims of the particular scope of those at bar were never presented and asked for in the original application, and there abandoned by appellant upon a refusal thereof.

In *In re Willingham*, 282 F.2d 353, 356-57, 127 USPQ 211, 215-16 (CCPA 1960) the court found that the reissue claims, while broader in scope than allowed claim 15, were somewhat

narrower in scope than deleted claim 12. The court then stated that

The deliberate cancellation of a claim of an original application in order to secure a patent cannot ordinarily be said to be an "error" and will in most cases prevent the applicant from obtaining the cancelled claim by reissue. The extent to which it may also prevent him from obtaining other claims differing in form or substance from that cancelled necessarily depends upon the facts in each case and particularly on the reasons for the cancellation.

In the instant case, the reasons for the deletion of claim 12 of the original application do not appear of record, and we may not properly speculate as to what they may have been and base our decision on the results of such speculation. The appealed claims differ materially from cancelled claim 12 and there is nothing of record on which to base a holding that the cancellation of claim 12 was in any sense an admission that the reissue claims on appeal were not in fact patentable to appellant at the time claim 12 was deleted.

The court in In re Wessler, 367 F.2d 838, 151 USPQ 339 (CCPA 1966) reversed a rejection under 35 U.S.C. § 251 wherein the claims presented on appeal defined patentable subject matter and were narrower in scope than the cancelled claims in the application which resulted in the appellant's patent but were broader than the patent claims. The court noted (id. at 849, 151 USPQ at 348) that since there is no objection to the

appealed claims based on the prior art, they did not think the statement in Shepard<sup>7</sup>, arising from the facts therein stated, is applicable here. The court then stated that Shepard may be support for the rule that "one who deliberately adds a limitation to avoid the prior art cannot omit that limitation in reissue claims so as to encroach upon the prior art, but that is not the situation here as the board's opinions clearly point out." Lastly, the court found (id. at 850, 151 USPQ at 349) as a factual matter that a mistake occurred in the prosecution of the patent application. That mistake was in not then presenting the appealed claims with the result that the appellant's patent claimed less than he had the right to claim. The court also found that the record establishes that the appellant erroneously considered he was securing protection commensurate with the invention disclosed in the

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<sup>7</sup> Shepard v. Carrigan, 116 U.S. 593, 597 (1886) states that

Where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent.

original application. There was no evidence that the appellant intentionally omitted or abandoned the claimed subject matter. Thus, the court found that while appellant acted "deliberately" he did so in error. This error, in view of the facts of record, was held to be an "error without any deceptive intention" which entitled the appellant to secure a reissue of his patent under the provisions of 35 U.S.C. § 251.

The court in In re Richman, 409 F.2d 269, 161 USPQ 359, (CCPA 1969) reversed a rejection under 35 U.S.C. § 251 wherein the claims rejected were narrower in scope than the cancelled claims in the application which resulted in the appellant's patent but were broader than the patent claims. The court set forth (id. at 274, 161 USPQ at 362) that the recapture question raised in the appeal was whether the appealed claims are of the same scope as the cancelled claims, not whether they lack some specific recitation absent from the cancelled claims but included in the patent claims.

The court in In re Wadlinger, 496 F.2d 1200, 1207-08, 181  
USPQ 826, 832 (CCPA 1974) stated that

in its decisions both before and after Wesseler, has made it clear that a reissue applicant is, at most, prevented by interpretations of the language of § 251, and its predecessor statute R. S. 4916, from obtaining claims which are of the same scope as the claims previously cancelled in the original application. As for obtaining claims on reissue which are different, no prohibition arises merely because of the language of the reissue statute. Still apropos and basic is our statement in Wesseler, 151 USPQ at 348:

We think the term "error," arising as it does in a remedial provision designed to advance both the rights of the public and the inventor, is to be interpreted as Congress has stated it, "error without any deceptive intention," and in light of Supreme Court decisions favoring the liberal construction of reissue statutes in order to secure to inventors protection for what they have actually invented.

See In re Richman, 56 CCPA 1083, 409 F.2d 269, 161 USPQ 359 (1969), holding there was "error without any deceptive intention" under § 251 where the reissue claims differed in scope from cancelled claims and also found, as in Wesseler, that "while appellant acted 'deliberately', he did so in error."

The court in Wadlinger reversed the rejection under 35 U.S.C. § 251 of claims which were narrower in scope than the cancelled claims in the application but were broader in scope than the patent claims.

The Court of Appeals for the Federal Circuit first discussed the recapture rule in Ball Corporation v. United States, 729 F.2d 1429, 1435-36, 221 USPQ 289, 293-95 (Fed. Cir. 1984). The Court provided that

Reissue is not a substitute for Patent Office appeal procedures. Reissue is an extraordinary procedure and must be adequately supported by the circumstances detailed in 35 U.S.C. § 251 (1976) and in the implementing regulations, 37 C.F.R. § 1.175 (1982). The Government asserts that the nature of error that will justify reissue is narrowly circumscribed to ensure that reissue remains the exception and not the rule. Relying on Edward Miller & Co. v. Bridgeport Brass Co., the Government contends that "a mere error of judgment" is not adequate to support reissue; rather the error must be "a real bona fide mistake, inadvertently committed."

The 1952 revision of the patent laws made no substantive change in the definition of error under section 251. While deliberate cancellation of a claim cannot ordinarily be considered error, the CCPA has repeatedly held that the deliberate cancellation of claims may constitute error, if it occurs without deceptive intent. In re Petrow, the CCPA went so far as to state that error is sufficient where the deliberate cancellation of claims does not amount to an admission that the reissue claims were not patentable at the time the original claims were canceled. Similarly, in In re Wesseler, the CCPA stated that error is established where there is no evidence that the appellant intentionally omitted or abandoned the claimed subject matter. Thus, the CCPA has construed the term error under section 251 broadly.

The Ninth Circuit employed a more rigid standard in Riley v. Broadway-Hale Stores, Inc. stating: "when the

chief element added by reissue has been abandoned while seeking the original patent, the reissue is void." The trial judge sought to determine whether Ball has made a deliberate judgment that claims of substantially the same scope as the new reissue claims would have been unpatentable. The Government, arguing from Riley, submits that the trial judge's approach loses sight of the feature given up by a patentee in order to secure the original patent. We decline to adopt the rigid standard applied in Riley, in favor of the more liberal approach taken by the CCPA. Petrow clearly establishes the vitality of the standard employed by the trial judge under this court's precedent.

Further, the Government argues that we need not reach the issue of claim scope because the sufficiency of error is a threshold issue. While claim scope is no oracle on intent, the Government fails to apprehend its role. Rarely is evidence of the patentee's intent in canceling a claim presented. Thus, the court may draw inferences from changes in claim scope when other reliable evidence of the patentee's intent is not available. Claim scope is not the lodestar of reissue. Rather, the court's reliance on that indicator in the case law appears to be born of practical necessity as the only available reliable evidence.

The Government relies heavily on *Haliczer v. United States* which also involved a suit under 28 U.S.C. § 1498. The Court of Claims in that case held the reissue claims invalid because the patentee sought to acquire through reissue the same claims that had earlier been canceled from the original application. The recapture rule bars the patentee from acquiring, through reissue, claims that are of the same or of broader scope than those claims that were canceled from the original application. On the other hand, the patentee is free to acquire, through reissue, claims that are narrower in scope than the canceled claims. If the reissue claims are narrower than the canceled claims, yet broader than the original patent

claims, reissue must be sought within 2 years after grant of the original patent.

Thus, the applicability of the recapture rule and the sufficiency of error under section 251 turn in this case, in the absence of other evidence of the patentee's intent, on the similarity between the reissue and the canceled claims. Narrower reissue claims are allowable; broader reissue claims or reissue claims of the same scope as the canceled claims are not. The subject matter of the claims is not alone controlling. Similarly, the focus is not, as the Government contends, on the specific limitations or on the elements of the claims but, rather, on the scope of the claims. [Footnotes omitted]

The Court in Ball found (729 F.2d at 1438, 221 USPQ at 296) that the reissue claims (which were broader than the canceled claims in one respect and narrower than the canceled claims in some respects) were valid. Specifically, the Court found that the non-material, broader aspects of Ball's reissue claims do not deprive them of their fundamental narrowness of scope relative to the canceled claims. Thus, the reissue claims were sufficiently narrower than the canceled claims to avoid the effect of the recapture rule.

The court in Whittaker Corp. v. UNR Industries Inc., 911 F.2d 709, 713, 15 USPQ2d 1742, 1745 (Fed. Cir. 1990) stated

Since we hold that the claims of the reissue patent are narrower in scope than the cancelled original claims of the application that resulted in the '882 patent, the '453 patent cannot be held invalid under the recapture rule as described in Ball Corp. v. United States, 729 F.2d 1429, 1436, 221 USPQ 289, 295 (Fed. Cir. 1984) ("the patentee is free to acquire, through reissue, claims that are narrower in scope than the canceled claims.")

The court in Mentor Corp. v. Coloplast, Inc., 998 F.2d 992, 995, 27 USPQ2d 1521, 1524 (Fed. Cir. 1993) stated that

Reissue "error" is generally liberally construed, and we have recognized that "[a]n attorney's failure to appreciate the full scope of the invention" is not an uncommon defect in claiming an invention. In re Wilder, 736 F.2d 1516, 1519, 222 USPQ 369, 371 (Fed. Cir. 1984), cert. denied, 469 U.S. 1209 (1985). However, the reissue procedure does not give the patentee "a second opportunity to prosecute de novo his original application," In re Weiler, 790 F.2d 1576, 1582, 229 USPQ 673, 677 (Fed. Cir. 1986).

The deliberate cancellation of a claim of an original application in order to secure a patent cannot ordinarily be said to be an "error" and will in most cases prevent the applicant from obtaining the cancelled claim by reissue. The extent to which it may also prevent him from obtaining other claims differing in form or substance from that cancelled necessarily depends upon the facts in each case and particularly on the reasons for the cancellation.

In re Willingham, 282 F.2d 353, 357, 127 USPQ 211, 215 (CCPA 1960).

If a patentee tries to recapture what he or she previously surrendered in order to obtain allowance of

original patent claims, that "deliberate withdrawal or amendment . . . cannot be said to involve the inadvertence or mistake contemplated by 35 U.S.C. § 251, and is not an error of the kind which will justify the granting of a reissue patent which includes the matter withdrawn." Haliczer v. United States, 356 F.2d 541, 545, 148 USPQ 565, 569 (Ct. Cl. 1966). "The recapture rule bars the patentee from acquiring, through reissue, claims that are of the same or of broader scope than those claims that were cancelled from the original application." Ball Corp., 729 F.2d at 1436, 221 USPQ at 295 (citations omitted).

The reissue claims before the court in Mentor were narrower in some respects than the canceled claims and broader in others respects than the canceled claims. The court in Mentor asserted (998 F.2d at 996, 27 USPQ2d at 1525) that reissue claims that are broader in certain respects and narrower in others than the surrendered subject matter may avoid the effect of the recapture rule; thus, if a reissue claim is broader in a way that does not attempt to reclaim what was surrendered earlier, the recapture rule may not apply. The court in Mentor held that the reissue claims did not avoid the recapture rule since

the reissue claims are broader than the original patent claims in a manner directly pertinent to the subject matter surrendered during prosecution. Mentor thus attempted to reclaim what it earlier gave up. Moreover,

the added limitations do not narrow the claims in any material respect compared with their broadening.

Id.

The court in In re Clement, 131 F.3d 1464, 1468-70, 45 USPQ2d 1161, 1163-65 (Fed. Cir. 1997) stated that

An attorney's failure to appreciate the full scope of the invention qualifies as an error under section 251 and is correctable by reissue. In re Wilder, 736 F.2d 1516, 1519, 222 USPQ 369, 370-71 (Fed. Cir. 1984). Nevertheless, "deliberate withdrawal or amendment . . . cannot be said to involve the inadvertence or mistake contemplated by 35 U.S.C. § 251." Haliczer v. United States, 356 F.2d 541, 545, 148 USPQ 565, 569 (Ct. Cl. 1966). The recapture rule, therefore, prevents a patentee from regaining through reissue the subject matter that he surrendered in an effort to obtain allowance of the original claims. See Mentor, 998 F.2d at 995, 27 USPQ2d at 1524. Under this rule, claims that are "broader than the original patent claims in a manner directly pertinent to the subject matter surrendered during prosecution" are impermissible. Id. at 996, 27 USPQ2d at 1525.

The first step in applying the recapture rule is to determine whether and in what "aspect" the reissue claims are broader than the patent claims. For example, a reissue claim that deletes a limitation or element from the patent claims is broader in that limitation's aspect. Clement argues that the board focused too much on the specific limitations that were omitted from the reissue claims. Although the scope of the claims is the proper inquiry, In re Richman, 409 F.2d 269, 274, 161 USPQ 359, 362 (CCPA 1969), claim language, including limitations, defines claim scope. Abtox, Inc. v. Exitron Corp., 122 F.3d 1019, 1023, 43 USPQ2d 1545, 1548 (Fed. Cir. 1997);

Bell Communications Research, Inc. v. Vitalink Communications Corp., 55 F.3d 615, 619, 34 USPQ2d 1816, 1819 (Fed. Cir. 1995) ("[T]he language of the claim defines the scope of the protected invention."). Under Mentor, courts must determine in which aspects the reissue claim is broader, which includes broadening as a result of an omitted limitation. The board did not err by determining which limitations Clement deleted from the patent claims.

The second step is to determine whether the broader aspects of the reissue claims relate to surrendered subject matter. To determine whether an applicant surrendered particular subject matter, we look to the prosecution history for arguments and changes to the claims made in an effort to overcome a prior art rejection. See Mentor, 998 F.2d at 995-96, 27 USPQ2d at 1524-25; Ball Corp. v. United States, 729 F.2d 1429, 1436, 221 USPQ 289, 294-95 (Fed. Cir. 1984).

Although the recapture rule does not apply in the absence of evidence that the applicant's amendment was "an admission that the scope of that claim was not in fact patentable," Seattle Box Co. v. Industrial Crating & Packing, Inc., 731 F.2d 818, 826, 221 USPQ 568, 574 (Fed. Cir. 1984), "the court may draw inferences from changes in claim scope when other reliable evidence of the patentee's intent is not available," Ball, 729 F.2d at 1436, 221 USPQ at 294. Deliberately canceling or amending a claim in an effort to overcome a reference strongly suggests that the applicant admits that the scope of the claim before the cancellation or amendment is unpatentable, but it is not dispositive because other evidence in the prosecution history may indicate the contrary. . . . Amending a claim "by the inclusion of an additional limitation [has] exactly the same effect as if the claim as originally presented had been canceled and replaced by a new claim including that limitation." In re Byers, 230 F.2d 451, 455, 109 USPQ 53, 55 (CCPA 1956).

Once we determine that an applicant has surrendered the subject matter of the canceled or amended claim, we then determine whether the surrendered subject matter has crept into the reissue claim. Comparing the reissue claim with the canceled claim is one way to do this. In re Wadlinger, 496 F.2d 1200, 1204, 181 USPQ 826, 830 (CCPA 1974); Richman, 409 F.2d at 274, 161 USPQ at 362. If the scope of the reissue claim is the same as or broader than that of the canceled claim, then the patentee is clearly attempting to recapture surrendered subject matter and the reissue claim is, therefore, unallowable. Ball, 729 F.2d at 1436, 221 USPQ at 295 ("The recapture rule bars the patentee from acquiring, through reissue, claims that are the same or of broader scope than those claims that were canceled from the original application.") (emphasis omitted); Byers, 230 F.2d at 456, 109 USPQ at 56. In contrast, a reissue claim narrower in scope escapes the recapture rule entirely. Ball, 729 F.2d at 1436, 221 USPQ at 295.

Some reissue claims, however, are broader than the canceled claim in some aspects, but narrower in others. In Mentor, for example, the issued claim, which was directed to a condom catheter, recited an adhesive means that was transferred from an outer to an inner surface without turning the condom inside-out. 998 F.2d at 993, 27 USPQ2d at 1523. The issued claim also recited, inter alia, that the condom catheter included a "thin cylindrical sheath member of resilient material rolled outwardly upon itself to form consecutively larger rolls . . . ." One canceled claim recited an adhesive means between the rolls, but did not specify that the adhesive was transferred from the outer to the inner surface without turning the condom inside-out. Another canceled claim recited that adhesive was transferred from the outer to the inner surface, but did not specify that this operation was done without turning the condom inside-out. The prior art rejections focused on the obviousness of the adhesive means positioned between the rolls and the process of transferring adhesive to the inner surface of the condom.

In making amendments to the claim, the applicant argued that "none of the references relied upon actually showed the transfer of adhesive from the outer surface to the inner surface as the sheath is rolled up and then unrolled." Id. at 995-96, 27 USPQ2d at 1524-25 (emphasis omitted). The reissue claim eliminated the limitation that adhesive was transferred from the outer to the inner layer, and was, therefore, broader in this aspect. The reissue claim was also narrower than the canceled claim because it recited that the catheter included "a thin, flexible cylindrical member of resilient material rolled outwardly upon itself to form a single roll. . . ." (Emphasis omitted). We held that, although the "flexible" and "single roll" limitations made the reissue claim narrower than both the canceled and issued claims, it did not escape the recapture rule because these limitations did not "materially narrow the claim [ ]." Id. at 996-97, 27 USPQ2d at 1525-26.

Similarly, in Ball, the issued claim recited "a plurality of feedlines" and a "substantially cylindrical conductor." 729 F.2d at 1432-33, 221 USPQ at 291-92. The canceled claim recited "feed means includ[ing] at least one conductive lead," and a "substantially cylindrical conductor." The prosecution history showed that the patentee added the "plurality of feedlines" limitation in an effort to overcome prior art, but the cylindrical configuration limitation was neither added in an effort to overcome a prior art rejection, nor argued to distinguish the claims from a reference. Id. The reissue claim included limitations not present in the canceled claims that related to the feed means element, but allowed for multiple feedlines. On balance, the claim was narrower than the canceled claim with respect to the feed means aspect. The reissue claim also deleted the cylindrical configuration limitation, which made the claim broader with respect to the configuration of the conductor. Id. at 1437, 221 USPQ at 295. We allowed the reissue claim because the patentee was not attempting to recapture surrendered subject matter. Id. at 1438, 221 USPQ at 296.

In both *Mentor* and *Ball*, the relevance of the prior art rejection to the aspects narrowed in the reissue claim was an important factor in our analysis. From the results and reasoning of those cases, the following principles flow:

(1) if the reissue claim is as broad as or broader than the canceled or amended claim in all aspects, the recapture rule bars the claim; (2) if it is narrower in all aspects, the recapture rule does not apply, but other rejections are possible; (3) if the reissue claim is broader in some aspects, but narrower in others, then: (a) if the reissue claim is as broad as or broader in an aspect germane to a prior art rejection, but narrower in another aspect completely unrelated to the rejection, the recapture rule bars the claim; (b) if the reissue claim is narrower in an aspect germane to prior art rejection, and broader in an aspect unrelated to the rejection, the recapture rule does not bar the claim, but other rejections are possible. *Mentor* is an example of (3)(a); *Ball* is an example of (3)(b).

The court in *Clement* held that reissue claim 49 was both broader and narrower in areas relevant to the prior art rejections. Comparing reissue claim 49 with claim 42 before the May 1988 and June 1987 amendments, the court found that claim 49 was narrower in one area, namely, the brightness is "at least 59 ISO in the final pulp." This narrowing related to a prior art rejection because, during the prosecution of the '179 patent, *Clement* added this brightness limitation in an effort to overcome *Burns*. The court's comparison also revealed that reissue claim 49 was broader in that it

eliminates the room temperature and specific energy limitations of step (a), and the temperature, specific energy, and pH values of steps (c) and (d). This broadening directly related to several prior art rejections because, in an effort to overcome Ortner, Clement added to step (a) the limitation that it is carried out "at room temperature," and applies "specific mechanical energy lower than 50 KW.H/Ton to form a pumpable slurry." On balance, the court held that reissue claim 49 was broader than it was narrower in a manner directly pertinent to the subject matter that Clement surrendered throughout the prosecution and accordingly the court affirmed the board's decision to sustain the examiner's rejection of claim 49 under 35 U.S.C. § 251 based on the recapture rule.

The court in Hester Indus., Inc. v. Stein, Inc., 142 F.3d 1472, 1479-84, 46 USPQ2d 1641, 1647-51 (Fed. Cir. 1998) provided

In considering the "error" requirement, we keep in mind that the reissue statute is "based on fundamental principles of equity and fairness, and should be construed liberally." In re Weiler, 790 F.2d 1576, 1579, 229 USPQ 673, 675 (Fed. Cir. 1986). We also keep in mind that "not every event or circumstance that might be labeled 'error' is correctable by reissue." Id. Indeed,

the reissue procedure does not give the patentee the right "to prosecute de novo his original application." Id. at 1582, 229 USPQ at 677; see also Mentor Corp. v. Coloplast, Inc., 998 F.2d 992, 995, 27 USPQ2d 1521, 1524 (Fed. Cir. 1993).

One of the most commonly asserted "errors" in support of a broadening reissue is the failure of the patentee's attorney to appreciate the full scope of the invention during the prosecution of the original patent application. See Amos, 953 F.2d at 616, 21 USPQ2d at 1273; In re Wilder, 736 F.2d 1516, 1519, 222 USPQ 369, 371 (Fed. Cir. 1984). This form of error has generally been accepted as sufficient to satisfy the "error" requirement of § 251. See Clement, 131 F.3d at 1468, 45 USPQ2d at 1163; Wilder, 736 F.2d at 1519, 222 USPQ at 371. Williams asserted this form of error as the basis for his reissue applications, and the Patent Office accepted his assertion as adequate.

However, the district court concluded that there was no such error by Williams' attorney. Hester, 963 F. Supp. at 1411. In reaching this conclusion, the court was particularly persuaded by the prosecution history of the original patent. The court concluded that the attorney's repeated attempts to distinguish Williams' invention on the basis of the "solely with steam" and "two sources of steam" limitations belied Williams' assertion that his attorney failed to appreciate the full scope of his invention. Id. at 1409-11. The court also determined that there was no other form of § 251 "error" and thus held the asserted reissue claims invalid. Id. at 1411-12.

We share the district court's discomfort with Williams' attempt to remove, through reissue, the "solely with steam" and "two sources of steam" limitations after having relied so heavily on those limitations to obtain allowance of the original patent claims over the prior

art. This concern is addressed most squarely by the "recapture rule," recently discussed at length in Clement, 131 F.3d 1464, 45 USPQ2d 1161. The recapture rule "prevents a patentee from regaining through reissue . . . subject matter that he surrendered in an effort to obtain allowance of the original claims." Clement, 131 F.3d at 1468, 45 USPQ2d at 1164. The rule is rooted in the "error" requirement in that such a surrender is not the type of correctable "error" contemplated by the reissue statute. See Mentor, 998 F.2d at 995-96, 27 USPQ2d at 1525.

In its motion for summary judgment, Stein presented the recapture rule as one basis for finding the asserted reissue claims invalid, and Stein repeats this argument on appeal as one basis for affirming the summary judgment of invalidity. While the district court did not explicitly rule on this ground, its opinion indicates the view that Hester, through the reissue patents, recaptured surrendered subject matter. Hester, 963 F. Supp. at 1412 (stating that through the reissues, Hester obtained claims covering "ovens with characteristics repeatedly distinguished and disclaimed in the PTO" and that was contrary to the "error" requirement of § 251). As will be next explained, we conclude that the asserted reissue claims violate the recapture rule and that the summary judgment ruling is appropriately affirmed on this ground.

"Under [the recapture] rule, claims that are 'broader than the original patent claims in a manner directly pertinent to the subject matter surrendered during prosecution' are impermissible." Clement, 131 F.3d at 1468, 45 USPQ2d at 1164 (quoting Mentor, 998 F.2d at 996, 27 USPQ2d at 1525). Application of the recapture rule begins with a determination of whether and in what respect the reissue claims are broader than the original patent claims. See id. A reissue claim that does not include a limitation present in the original patent claims is broader in that respect. See id. Here, it is undisputed that the asserted reissue claims are broader

than the original patent claims in that the reissue claims do not include the "solely with steam" and "two sources of steam" limitations found in each of the original patent claims.

Having determined that the reissue claims are broader in these respects, under the recapture rule we next examine whether these broader aspects relate to surrendered subject matter. See id. at 1468-69, 45 USPQ2d at 1164. "To determine whether an applicant surrendered particular subject matter, we look to the prosecution history for *arguments* and changes to the claims made in an effort to overcome a prior art rejection." Id. at 1469, 45 USPQ2d at 1164 (emphasis added). This statement in Clement indicates that a surrender can occur by way of arguments or claim changes made during the prosecution of the original patent application. To date, the cases in which this court has found an impermissible recapture have involved claim amendments or cancellations. See, e.g., id. at 1469-70, 45 USPQ2d at 1164-65; Mentor, 998 F.2d at 995-96, 27 USPQ2d at 1524-25. However, in addition to the suggestion in Clement that argument alone can effect a surrender, this court expressly left open that possibility in Ball Corp. v. United States: "If reissue is sought where claims have not been previously canceled, analysis becomes more difficult. In that case relative claim scope is not available to illuminate the alleged error. We are not faced with that situation in this proceeding." 729 F.2d 1429, 1436 n.19, 221 USPQ 289, 295 n.19 (Fed. Cir. 1984). Prior to this case, this court has not squarely addressed the question.

. . .

Thus we conclude that, in a proper case, a surrender can occur through arguments alone. We next evaluate whether such a surrender occurred here with respect to the "solely with steam" and "two sources of steam" limitations, the pertinent aspects in which the asserted reissue claims are broader than the original patent

claims. The obvious conclusion is that there has been a surrender.

. . .

Having concluded that there has been a surrender, we must next determine whether the surrendered subject matter has crept back into the asserted reissue claims. See Clement, 131 F.3d at 1469, 45 USPQ2d at 1164. When the surrender occurs by way of claim amendment or cancellation, "[c]omparing the reissue claim with the canceled claim is one way to do this." See id. This analysis is not available when the surrender is made by way of argument alone. Instead, in this case, we simply analyze the asserted reissue claims to determine if they were obtained in a manner contrary to the arguments on which the surrender is based.

Clearly they were. None of the asserted reissue claims include either the "solely with steam" limitation or the "two sources of steam" limitation. Thus, this surrendered subject matter -- i.e., cooking other than solely with steam and with at least two sources of steam -- has crept into the reissue claims. The asserted reissue claims are unmistakably broader in these respects.

Finally, because the recapture rule may be avoided in some circumstances, we consider whether the reissue claims were materially narrowed in other respects. See, e.g., Mentor, 998 F.2d at 996, 27 USPQ2d at 1525 ("Reissue claims that are broader in certain respects and narrower in others may avoid the effect of the recapture rule."); Clement, 131 F.3d at 1470, 45 USPQ2d at 1165. For example, in Ball the recapture rule was avoided because the reissue claims were sufficiently narrowed (described by the court as "fundamental narrowness") despite the broadened aspects of the claims. 729 F.2d at 1438, 221 USPQ at 296. In the context of a surrender by way of argument, this principle, in appropriate cases, may operate to overcome the recapture rule when the

reissue claims are materially narrower in other overlooked aspects of the invention. The purpose of this exception to the recapture rule is to allow the patentee to obtain through reissue a scope of protection to which he is rightfully entitled for such overlooked aspects.

However, this is not such a case. The asserted reissue claims are not materially narrower, despite Hester's arguments to the contrary. Hester argues that the claims are materially narrower by the addition of the "spiral conveyance path" and "high humidity steam" limitations. The term "high humidity steam" is included in each of the asserted reissue claims except reissue claim 30 of the '259 reissue patent. However, the term "high humidity steam" is actually the same as or broader than the limitation in original claim 1 that this term replaced. Original claim 1 specifies a steam atmosphere "at near 100% humidity 100 degrees C. and a pressure above atmospheric." '047 patent, col. 6, ll. 3-4. Hester concedes that the term "high humidity steam" is not narrower than this limitation in original claim 1. In fact, with respect to the claim construction issue, Hester argues that the limitation in original claim 1 is but one example of "high humidity steam." Accordingly, the use of the term "high humidity steam" does not save the reissue claims from the recapture rule.

The term "spiral conveyance path" is also not materially limiting. This term appears explicitly in asserted reissue claims 28, 32, 75, and 76 of the '259 reissue patent; it does not appear explicitly in the other reissue claims asserted. Original claim 1 includes a corresponding limitation, namely, "means passing said conveyor belt through said housing. . . ." This is a so-called means-plus-function clause drafted pursuant to 35 U.S.C. § 112 ¶ 6 (1994). According to § 112 ¶ 6, the clause is to be construed to "cover the corresponding structure . . . described in the specification and equivalents thereof." The only corresponding structure described in the specification (more properly, the written description of the patent) passes the conveyor belt through a spiral path. See '047 patent, col. 4, l.

64 to col. 5, l. 8. Thus, the explicit recitation of a "spiral conveyance path" in some of the asserted reissue claims does not materially narrow those claims. Indeed, Hester does not explain how the explicit recitation of a spiral conveyance path--which is present in prior art cookers cited by the examiner during the prosecution of the original patent--materially narrows these claims. In sum, neither alone nor together do the terms "high humidity steam" and "spiral conveyance path" materially narrow the claims.

Furthermore, the "spiral conveyance path" and "high humidity steam" limitations are not aspects of the invention that were overlooked during prosecution of the original patent. To the contrary, as just explained, these aspects were included in original claim 1. Additionally, with regard to the "spiral conveyance path" limitation, original dependent claim 12 explicitly recites "a spiral path." '047 patent, col. 6, l. 60. In prosecuting the original patent, Williams pointed out these features in an attempt to overcome the Examiner's obviousness rejection. Hester cannot now argue that Williams overlooked these aspects during the prosecution of the original patent application. In conclusion, this is not a case which involves the addition of material limitations that overcome the recapture rule.

In effect, Hester, through eight years of reissue proceedings, prosecuted Williams' original patent application anew, this time placing greater emphasis on aspects previously included in the original patent claims and removing limitations repeatedly relied upon to distinguish the prior art and described as "critical" and "very material" to the patentability of the invention. The reissue statute is to be construed liberally, but not that liberally. The realm of corrections contemplated within § 251 does not include recapturing surrendered subject matter, without the addition of materially-narrowing limitations, in an attempt to 'custom-fit' the reissue claims to a competitor's product.

No doubt if two patent attorneys are given the task of drafting patent claims for the same invention, the two attorneys will in all likelihood arrive at somewhat different claims of somewhat different scope. And such differences are even more likely when, as here, the second attorney drafts the new claims nearly a decade later and with the distinct advantage of having before him the exact product offered by the now accused infringer. This reality does not justify recapturing surrendered subject matter under the mantra of "failure to appreciate the scope of the invention." The circumstances of the case before us simply do not fit within the concept of "error" as contemplated by the reissue statute. See Mentor, 998 F.2d at 996, 27 USPQ2d at 1525 ("Error under the reissue statute does not include a deliberate decision to surrender specific subject matter in order to overcome prior art, a decision which in light of subsequent developments in the marketplace might be regretted.").

With respect to the recapture issue, there are no underlying material facts as to which there is a genuine issue in dispute. The original patent's prosecution history, on which we rely, is before us and undisputed. All that remains is the ultimate legal conclusion as to whether the asserted reissue claims fail to meet the "error" requirement because the claims impermissibly recapture surrendered subject matter. See id. at 994, 27 USPQ2d at 1524 (stating that whether the "error" requirement has been met is a legal conclusion). For the reasons explained above, we conclude as a matter of law that the asserted reissue claims fail in this regard. Summary judgment of invalidity of the asserted reissue claims under § 251 is called for. Accordingly, we affirm the district court's entry of summary judgment.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

Section 251, ¶1, provides in pertinent part:

Whenever any patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than he had a right to claim in the patent, the Director shall . . . reissue the patent for the invention disclosed in the original patent, and in accordance with a new and amended application, for the unexpired part of the term of the original patent.

Section 251, ¶4, provides:

No reissued patent shall be granted enlarging the scope of the claims of the original patent unless applied for within two years from the grant of the original patent.

Our findings above clearly demonstrate that this reissue application was applied for within two years from the grant of the original patent. Thus, the appellant is not barred by the fourth paragraph of 35 U.S.C. § 251 from enlarging the scope

of the claims of the original patent. However, under the error requirement of the first paragraph of 35 U.S.C. § 251, the appellant may not enlarge the scope of the patent claims so as to recapture subject matter that was surrendered during prosecution of the patent.

In our view, the cases cited above in the PRECEDENT section of this decision establish the following three categories with respect to the recapture rule:

- (1) if the reissue claim is as broad as or broader than the surrendered subject matter (i.e., a claim canceled or amended<sup>8</sup> in an effort to overcome a prior art rejection) in all aspects, the recapture rule bars the claim;
- (2) if it is only narrower than the surrendered subject matter, the recapture rule does not apply, but other rejections are possible;

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<sup>8</sup> By amended claim it is meant the claim in its form prior to it being amended, not the claim as amended. Thus, for example, when original claim 1 is rejected over prior art under 35 U.S.C. § 102 or 35 U.S.C. § 103 and then is replaced by amended claim 1, which amended claim 1 is allowed by the examiner, the surrendered subject matter is original claim 1, not amended and now allowed claim 1.

(3) if the reissue claim is broader than the surrendered subject matter in some aspects and also narrower than the surrendered subject matter in others, then the recapture rule may bar the claim. See, e.g., Ball, Mentor, Clement and Hester. In our view, for recapture purposes, analysis of the patent claim is only required when the reissue claim falls under this category.

We find reissue claim 15 before us in this appeal to be narrower in scope than the surrendered subject matter (i.e., original claim 1 in Application No. 08/917,772) for the reasons set forth by the appellant (brief, pages 3-6)[category (2) above]. We do not find, and the examiner has not asserted, that reissue claim 15 is as broad as, or broader in any aspect, than the surrendered subject matter of original claim 1 in Application No. 08/917,772.

The recapture rule does not bar a reissue claim applied for within two years from the grant of the original patent that is only narrower in scope than the surrendered subject matter. See Ball 729 F.2d at 1436, 221 USPQ at 295;

Whittaker, 911 F.2d at 713, 15 USPQ2d at 1745; Clement, 131 F.3d at 1470, 45 USPQ2d at 1165. Since reissue claim 15 was applied for within two years from the grant of the original patent and is only narrower in scope than the surrendered subject matter, the recapture rule does not apply. Thus, the decision of the examiner to reject claim 15, and claims 16 to 18 dependent thereon, under 35 U.S.C. § 251 is reversed.

The examiner's error in this case was in comparing reissue claim 15 with patent claim 1 to see what limitations may have been deleted from the patent claim, instead of determining if the proposed reissue claim was as broad as or broader than the surrendered subject matter of original claim 1 in Application No. 08/917,772. In this regard, we note the clear language of 35 U.S.C. § 251 allows a patentee to obtain through reissue claims that are broader than the patent claims whenever through error without any deceptive intention the patentee has claimed less than the patentee had a right to claim in the

patent and the patentee has applied for such reissue within two years from the grant of the original patent.<sup>9</sup>

In addition, it is our opinion that the recapture rejection made by the examiner in this application is inappropriate because the evidence before us in this appeal fails to indicate that the appellant intended in the originally filed Application No. 08/917,772 to abandon subject matter of the scope of reissue claim 15. On the contrary, the submission of new claim 16 in the "Supplemental Amendment" filed on September 30, 1998, in Application No. 08/917,772 indicates precisely the opposite. Thus, we agree with the appellant's argument (brief, pages 6-8) that the subject matter of reissue claim 15 was never intended to be abandoned and therefore cannot now be subject to a rejection based upon reissue recapture estoppel.

#### CONCLUSION

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<sup>9</sup> Of course, if the reissue application is applied for by the assignee of the entire interest instead of the patentee the third paragraph of 35 U.S.C. § 251 bars enlarging (i.e., broadening) the scope of the claims of the original patent.

To summarize, the decision of the examiner to reject claims 15 to 18 under 35 U.S.C. § 251 is reversed.

REVERSED

CHARLES E. FRANKFORT	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	BOARD OF PATENT
LEE E. BARRETT	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
	)	
	)	
JEFFREY V. NASE	)	
Administrative Patent Judge	)	

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