

United States District Court,
C.D. California.

TRAFFIX DEVICES, INC.,

v.

BENT MANUFACTURING COMPANY.

No. SACV 03-1569 JVS(ANx)

Aug. 24, 2005.

Attorneys Present for Plaintiffs, Not Present.

Attorneys Present for Defendants, Not Present.

Present: The Honorable JAMES V. SELNA, J.

Karla J. Tunis, Deputy Clerk.

Not Present, Court Report.

Proceedings: (*In Chambers*) *Order re Claim Construction/Markman Hearing*

Plaintiff Traffix Devices, Inc. ("Traffix") and Defendant Bent Manufacturing Company ("Bent") have submitted to the Court proposed claim constructions regarding certain language in United States Patent Nos. 5,560,732 ("732 Patent"), 5,749,673 ("673 Patent"), 6,186,699 B1 ("699 Patent"), and 6,520,712 B2 ("712 Patent"). The relevant claim language is construed by the Court below.

Standard

Claim construction "begins and ends" with the claim language itself. *Interactive Gift Express, Inc. v. CompuServe, Inc.*, 256 F.3d 1323, 1331 (Fed.Cir.2001). In construing the language of a patent claim for purposes of claim construction, the patent and its prosecution history are of paramount importance. *Burke, Inc. v. Bruno Ind. Living Aids, Inc.*, 183 F.3d 1334, 1340 (Fed.Cir.1999). Evidence extrinsic to this public record may only be consulted "if needed to assist in determining the meaning or scope of technical terms in the claims." *Pall Corp. v. Micron Separations, Inc.*, 66 F.3d 1211, 1216 (Fed.Cir.1995); *accord* *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed.Cir.1996). The Court's starting point in determining the meaning of the terms at issue in this Motion is therefore the intrinsic evidence: the claim language, specification, and prosecution history of the patent.

Where the intrinsic evidence of a patent reveals that a patentee has acted as his own lexicographer with respect to a particular claim term-by creating a new word or assigning a new or different meaning to an existing word, for example-"the definition selected by the patent applicant controls" and the term's special

meaning is given full force. *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1249 (Fed.Cir.1998). The lexicography, however, must "appear with reasonable clarity, deliberateness, and precision before it can affect the claim." *Id.* (internal citations omitted). The test for whether a special meaning is reasonably clear is whether the patent or its prosecution history "put a reasonable competitor or one reasonably skilled in the art on notice" that the patentee intended to redefine the claim language at issue in the manner asserted. *Process Control Corp. v. HydReclaim Corp.*, 190 F.3d 1350, 1357 (Fed.Cir.1999), *cert. denied*. 529 U.S. 1037 (2000).

Where, on the other hand, the patent applicant is not deemed a lexicographer, there is a "heavy presumption" that the words in the claims have their full ordinary or accustomed meaning. *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989 (Fed Cir.1999). As the Federal Circuit has noted, "dictionaries, encyclopedias and treatises are particularly useful resources to assist the court in determining the ordinary and customary meanings of claim terms," *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1202 (Fed.Cir.2002), "so long as the dictionary definition does not contradict any definition found in or ascertained by a reading of the patent documents." *Phillips v. AWH Corp.*, 2005 WL 1620331, at (Fed.Cir. July 12, 2005). Furthermore, if a particular claim term has both an ordinary meaning and a customary meaning known to one ordinarily skilled in the art, and these meanings conflict, the latter meaning prevails. *Karlin Tech v. Surgical Dynamics*, 177 F.3d 968, 971 (Fed.Cir.1999).

With this in mind, the Court now turns to the construction of the claim language at issue.

Discussion

1. Background of Patents

In its First Amended Complaint filed in November 2004, Traffix seeks recovery against Bent for alleged infringement of four Patents: the '732 Patent, the '673 Patent, the '699 Patent, and the '712 Patent.

a. '732 Patent

The '732 Patent for "Safety Delineators" is the parent application to each of the other three patents at issue in this case and was issued on October 1, 1996. This patent is directed to a traffic safety device having improved gripping and stacking features. Specifically, the '732 Patent claims, in part, an "improved handle feature" that permits easy and comfortable "full hand gripping." (Ex. A to Bent's Opening Brief, '732 Patent, 2:39-41.) This handle also prevents any interfering contact between stacked delineators, thus reducing the potential of the delineators to stick or jam.

b. '673 Patent

The '673 Patent, entitled "Stackable Vertical Panel", is a continuation-in-part of the application for the '732 Patent. Particularly it claims one or more vertical panels affixed to a traffic safety delineator and the means to stack the delineators without removing the panels. Like the '732 Patent, it also claims a handle that permits full hand gripping of the delineator and that prevents sticking of the delineators when they are stacked together in a nesting relationship.

c. '699 Patent

The '699 Patent for "Easy Stackable Safety Delineators" is also a continuation-in-part of the '732 Patent. It

claims an improved vertical panel mounted on the delineator and also claims a projecting portion that extends from the top end of the body portion, which prevents two delineators from sticking or jamming together when stacked.

d. '712 Patent

The '712 Patent is entitled "Safety Delineators Which Easily Stack". This patent claims a plurality of stackable delineators. It also includes limitations as to the configuration of the handle and on the use of the design to limit the extent to which a delineator can be received within the hollow interior of the delineator stacked on top of it.

2. Claims to be Construed

TraFFix and Bent have presented to the Court for construction eighteen terms and phrases, which appear throughout the four patents-in-issue. The Court notes that the same construction shall be applied to identical terms found in two or more of these patents. *Advance Cardiovascular Sys., Inc. v. Medtronic Inc.*, 265 F.3d 1294, 1305 (Fed.Cir.2001).

a. " Body portion "

	TraFFix's Proposed Construction	Bent's Proposed Construction
"Body portion"	An upstanding, generally elongate article of manufacture having a top end and a bottom end and being of sufficient size and visibility to perform the function of a traffic delineator.	Positioned below the top end and has a diameter at its top that is greater than the diameter of the shaft portion of the handle.

TraFFix contends that its proposed construction of this term should be adopted because it stems from language in the four patents that indicates the "body portion" of the traffic safety delineator is both upstanding and elongate with both a top end and a bottom end. In addition, according to TraFFix, its construction is preferable to Bent's because it takes into account the primary objective of these patents, delineating traffic.

Bent, on the other hand, criticizes TraFFix's construction because it does not identify the body portion in specific terms. Bent argues that its own construction does provide this requisite detail, specifically, diameter restrictions, which it contends are essential to achieve the gripping and jamming improvements claimed by these patents. TraFFix, however, disagrees, insisting that by including the diameter restrictions Bent's construction violates claim the construction doctrines relating to claim differentiation and preferred embodiments.

The Court must agree with TraFFix: Bent's construction impermissibly narrows the scope of this claim term because it imports limitations from both dependent claims and preferred embodiments. It, therefore, cannot be adopted.

Under the doctrine of claim differentiation, the language of one claim ordinarily should not be interpreted to make any other claim identical in scope or otherwise redundant. 5A Chisum on Patents, s. 18.03[6] (1999). For example, an independent claim should not be construed as containing a limitation in a dependent claim. Here, the term "body portion" appears in independent claims in the four patents (*see, e.g.*, '732 Patent, 10:46; '673 Patent, 5:61), while the limitation of a "body portion" with a diameter greater at its top than that

of the shaft portion of the handle is found in dependent claims. FN1 ('732 Patent, 10:63-66; '673 Patent, 6:32-35.) Accordingly, adopting Bent's construction would necessarily violate the doctrine of claim differentiation.

FN1. The Court does recognize that dependent claim of the '673 Patent does include the limitation of a body portion with a diameter that is greater than the diameter of the shaft portion of the handle. Because this is an exception and because the parties have agreed that the disputed terms will be construed uniformly across the four patents, the Court finds that the doctrine of claim differentiation still prevents including a diameter limitation in the construction of "body portion".

Nevertheless, Bent contends that because the doctrine of claim differentiation is not absolute, but, rather, more of a guide, *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 541 (Fed.Cir.1998), the Court must depart from its lead because, otherwise, the objectives of the patents will not be met. The Court, however, is not persuaded because Bent's contention that a delineator's shaft must have a smaller diameter than the top end of the body portion in order to achieve the "full hand gripping" and jamming improvements of the patents is simply not accurate. The top end of the body portion and the shaft could have the same diameters and still perform their respective functions of delineating traffic and permitting full hand gripping. It appears that jamming could still be prevented when the top end of the body portion and the handle have the same diameter so long as the knob has a greater diameter than both, which the patents permit.

In addition to claim differentiation, the Court finds that it must reject Bent's proposed construction because it would limit the claims to preferred embodiments, a result that requires the express declaration of the patentee, which is absent here. *Karlin Tech. v. Surgical Dynamics, Inc.*, 177 F.3d 968, 973 (Fed.Cir.1999). Bent simply does not point to any clear indication that the patentee intended the term "body portion" in the claims to be strictly co-extensive with the embodiments in the specification. *Phillips*, 2005 WL 1620331, at *16. Therefore, the Court declines to construe this term in such a narrow manner.

On the other hand, the Court finds that TrafFix's proposed construction is acceptable because it endows "body portion" with its plain and ordinary meaning within the context of the patent. *Id.* at *14. From the language of the patents, it is clear that the "body portion" of a delineator is upstanding and elongate and that it has a top end and a base end. (TrafFix's Opening, pp. 9-12.) Furthermore, because the overall objective of the patents is to delineate traffic, the Court finds that it is only logical that the "body portion" of the delineators be capable of performing this function.

The Court, therefore, adopts TrafFix's proposed construction of "body portion".

b. " Top end "

	TrafFix's Proposed Construction	Bent's Proposed Construction
"Top end"	Should be literally construed.	An end, or limited part, at the top extremity of the body portion.

In its opening brief, TrafFix contends that the term "top end" should be literally construed as the place where the handle meets the body. According to TraFix, its construction is supported by the language of the patents. Bent, on the other hand, contends that TrafFix's construction is incomplete and erroneous because,

according to the patent, the "top end" of the body portion actually meets the transition portion of the delineator, rather than the handle. Therefore, Bent asserts, its proposed construction, which endows the term with its plain and ordinary meaning, should be accepted.

Because there is no evidence that the patentee acted as his own lexicographer, the Court must construe "top end" consistent with its plain and ordinary meaning in the context of the patent. Johnson, 175 F.3d at 989. The Court, however, finds that neither of the parties has provided such a construction. Traffix's proposal would, without the required "highly persuasive evidentiary support," Rheox, Inc. v. Entact, Inc., 276 F.3d 1319, 1327 (Fed. Cir.2000) (internal quotes deleted), exclude a preferred embodiment in which a "transition portion" lies between the handle and the body portion ('732 Patent, 11:3-10), and Bent's construction of "end" as a "limited part," is unclear about exactly how this part is limited.

The Court, therefore, adopts its own construction of "top end" based upon a synonym of the term "end" provided by *Roget's II: The New Thesaurus* (Bent's Amended Opening, Ex G) and the language of the patents: "Upper boundary beyond which the body portion does not extend".

c. " Handle "

	Traffix's Proposed Construction	Bent's Proposed Construction
"Handle"	Should be literally construed.	A cylindrical shaft and a knob that is hemispherical in shape.

Bent proposes its construction of this term on the grounds that it is consistent with the claim language. Specifically, Bent points to Claim 9 in the '732 Patent, which claims a "handle ... comprising a shaft portion ... and a knob portion...." ('732 Patent, 10:50-55.) In addition, Bent argues that this construction is proper because the configuration it describes is necessary to allow for comfortable gripping and to prevent the delineators from jamming when stacked.

Traffix, on the other hand, failed to include any discussion of the proper construction of this term in its Opening Brief. Rather, Traffix waited until its Reply, where it did not actually respond to any of Bent's arguments, but simply set forth its own set of arguments on this term. These totally new arguments, however, are untimely. They should have been raised in Traffix's Opening Brief so that Bent would have had the opportunity to respond. The Court, therefore, refuses to consider any of Traffix's arguments regarding this term.

As a result, Bent's construction of "handle" stands unopposed. For this reason, and because the Court finds that it is consistent with the language of the patents, the Court adopts Bent's construction of this term, except for those portions that limit the knob and the shaft to hemispherical and cylindrical shapes, respectively. With regard to the "hemispherical" limitation, the Court finds that including such a limitation would violate the doctrine of claim differentiation, 5A Chisum on Patents, s. 18.03[6] (1999), because "generally hemispherical" knobs are disclosed in dependent claims in Patents '723 and '673. ('723 Patent, 11:1-2; '673 Patent, 6:37-38.) On the "cylindrical" limitation, the Court finds that, as discussed more fully below, this would unnecessarily limit the scope of the "shaft".FN2

FN2. See, Discussion, 2.e., infra.

The Court, therefore, adopts a modified version of Bent's construction of the term "handle": "A shaft and a knob".

d. "Full hand gripping" and "Wrapped thereabout"

	TraFFix's Proposed Construction	Bent's Proposed Construction
"Full hand gripping"	Should be literally construed.	All of the fingers of an average adult hand be able to fully wrap around the handle and touch the heel of the palm.
"Wrapped thereabout"	Should be literally construed.	All of the fingers of an average adult hand should be fully wrapped around the handle and touch the heel of the palm.

Bent seeks adoption of its proposed constructions on the basis that they comport with the plain and ordinary meaning of these terms in the context of the patent. TraFFix, however, opposes adoption of Bent's constructions, contending instead that the terms "should be literally construed." TraFFix asserts that Bent's constructions are inappropriate because they would exclude a preferred embodiment. In addition, TraFFix argues that the portion of the constructions requiring the fingers to touch the heel of the palm lacks intrinsic support.

The Court agrees with TraFFix that Bent's construction cannot be adopted for the reasons it suggests: exclusion of a preferred embodiment and lack of intrinsic support. On the first ground, the Court finds that, if Bent's construction is adopted, the preferred embodiment of the '732 Patent, which includes a handle with a 1 1/4 inch diameter, would most likely be excluded. ('732 Patent, 5:25-28.) Such a result requires "highly persuasive evidentiary support," of which there is none here. *Rheox, Inc.*, 276 F.3d at 1327.

With regard to the second ground, lack of intrinsic support, the Court has found no evidence in the patents that "full hand gripping" or "wrapped thereabout" require the fingers to touch the heel of the palm. The only requirement of the patents' gripping improvement is that the full hand, as opposed to just the fingers, be utilized in grasping a safety delineator. While such full hand gripping may include a situation in which a person's fingers touch the palm of their hand as they grip or wrap around the delineator, this is not necessary. In fact, requiring the fingers to touch the heel of the hand could actually render statements in the specification contradictory. For example, in describing a preferred embodiment of the '732 Patent, the patentee stated that the "diameter of the shaft is small enough to be comfortably gripped by the hand of an average adult" and then suggested that this diameter should be 1 1/4 inches. ('732 Patent, 5:25-28.) Because, as noted above, a 1 1/4 inch diameter may not permit an average adult hand to wrap around a shaft such that the fingers would touch the heel of the palm, the "comfortably gripped" and 1 1/4 inch suggestion would be irreconcilable. Accordingly, the Court rejects Bent's proposed construction of these terms.

Because of this rejection and because TraFFix has offered no more than that the claim should be literally construed, which the Court finds is insufficient, the Court must now generate its own construction of these terms. In so doing, the Court notes that the patentee did not act as his own lexicographer with regard to these terms, therefore, they should be construed consistent with their plain and ordinary meanings in the context of the patent. *Johnson*, 175 F.3d at 989. To assist in this process, the Court referred to the *American Heritage Dictionary* for the ordinary meanings of the terms "gripping" and "wrapped". After reviewing the definitions provided by this source in light of the patent, the Court found that the most appropriate meaning for "gripping" is "grasping" and for "wrapped" is "clasped". Available at www.bartleby.com. Using this as a

basis, the Court adopts the following constructions:

"Full Hand Gripping": all of the fingers and the palm of the hand of an average adult are in contact with the delineator while it is being grasped; and

"Wrapped therabout": clasping the delineator so that there is contact between the delineator and all of the fingers and the palm of the hand of an average adult.

e. " Shaft "

	TraFFix's Proposed Construction	Bent's Proposed Construction
"Shaft"	Should be literally construed.	A column or cylindrical form.

According to Bent, its construction is appropriate because it is based upon the plain and ordinary meaning of the term "shaft", as provided by the *American Heritage Dictionary*. Indeed, this dictionary does define a shaft, when used in the an architectural context, as a "column". *Available* at www.yourdictionary.com. This dictionary, in turn, defines column, once again in the context of architecture, as a "cylindrical shaft". *Id.* Nonetheless, the Court finds that these definitions are of little use here because, as already noted, they deal explicitly with architecture and, therefore, do not relate to the particular context of the patents in this action, traffic safety delineators. Phillips, 2005 WL 1620331, at *14.

Moreover, the Court finds that Bent's construction is inappropriate for other reasons as well. First, it would limit the claims to a preferred embodiment in the specification of the '732 Patent. ('732 Patent, 5:24-25.) To limit a claim in this way, however, requires an express declaration by the patentee, Karlin Tech., 177 F.3d at 973, to which Bent fails point. In addition, the Court finds that, although a cylindrical shaft might be the most effective way to facilitate the comfortable gripping improvement, it is not required. Shafts of other shapes, for example octagonal or even square, could be comfortably gripped as well. Finally, the Court is not persuaded to accept Bent's construction on the basis that the patents use the term "diameter" in reference to this term. The claims that make these references are mostly dependent claims FN3, and therefore, under the doctrine of claim differentiation, the Court cannot construe the shaft identified in the independent claim to always have a "diameter". 5A Chisum on Patents, s. 18.03 [6] (1999).

FN3. *See* footnote 1, *supra*.

For these reasons, the Court finds that it must reject Bent's construction of the term "shaft", and, because TraFFix, again, has offered the Court nothing more than its opinion that this term "should be literally construed," the Court must provide its own construction for this term. In light of the language of the patents, the most applicable of the *American Heritage Dictionary's* definitions of "shaft", is "a long thin object or part." *Available* at www.bartleby.com. The Court, thus, construes this term to mean "the long thin portion of the handle".

f. " Knob "

	TraFFix's Proposed	Bent's Proposed Construction
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	Construction	
"Knob"	Should be literally construed.	Generally hemispherical form or rounded protuberance.

Bent argues that the Court should adopt its proposed claim construction because it relies on both the plain and ordinary meaning of the term, as defined by the *American Heritage Dictionary*, and language in the patent specification. Traffix opposes Bent's construction on the basis of the claim differentiation doctrine. According to Traffix, Bent's construction would render dependent Claim 12 of the '732 Patent redundant because it recites that the knob is hemispherical. ('732 Patent, 11:1-2.)

As explained above FN4, the Court agrees with Traffix that construing "knob" to be "generally hemispherical" would violate the doctrine of claim differentiation. The remainder of Bent's proposal, however, is generally acceptable. Nearly all the dictionaries that the Court consulted, including online versions of the *American Heritage Dictionary* and the *Merriam-Webster Dictionary*, defined "knob" as a "rounded protuberance" or in some way made clear that a "knob" was a round or generally rounded object. Available at www.yourdictionary.com; www.merriam-webster.com; see also *Compact Oxford English Dictionary*, available at www.askoxford.com; *Cambridge Advanced Learner's Dictionary*, available at www.dictionary.cambridge.org. The Court, therefore, agrees with Bent that the construction of this term must include the concept that a knob is rounded. Because, however, the idea of "rounded" includes not only shapes that are circular or spherical but also those that are elliptical or that have only a slight curvature, Bent's construction must be expanded somewhat. Accordingly, the Court adopts the following construction of "knob": "a generally round or rounded protuberance".

FN4. See Discussion, Section 2.c.

g. "At least [number] inches": "At least/approximately [number] inches long"

	Traffix's Proposed Construction	Bent's Proposed Construction
"At least [number] inches"; "At least/approximately [number] inches long"	Should be literally construed.	As measured from the intersection of the handle with the top end of the body portion.

The critical difference between the parties' proposed constructions appears not to be over what is meant when a handle or projected portion is described as being "at least" or "approximately" a certain number of inches long, but, rather, whether a construction need specify the point from which that handle or projected portion is measured. According to Bent, inclusion of such detail is required because the claim language is ambiguous as to where measurement should begin. On the contrary, Traffix asserts that no ambiguity exists on this point and that Bent's construction creates an even bigger language problem than the plain language of the claims.

While the Court believes that, in light of its construction of the term "handle" to mean "a shaft and knob" FN5, the point from which the handle should be measured is clearly the base of the shaft FN6, the sheer fact that the parties have submitted these terms for construction indicates at least a certain amount of ambiguity. As a result, the Court finds that, contrary to Traffix's assertions, clarification of these terms is required.

FN5. See Discussion, Section 2.c.

FN6. Or in the case of the '699 Patent, the measurement should be taken from the base of the projecting portion.

The Court, however, must reject the interpretation proposed by Bent because it fails to account for the preferred embodiment that includes a "transition portion" between the handle and the top end of the body portion. As the Court made clear in its construction of the term "top end", the shaft of the handle and the top end of the body portion are not always contiguous, but, rather, in certain embodiments may be separated by a transition portion, in some cases a fillet.FN7 If this Court were to adopt Bent's construction, measurements taken from embodiments that include this transition portion would be inaccurate because they would include not only the shaft and knob of the handle, but also the transition portion. The Court therefore provides and adopts the following construction, which it finds would result in an accurate measurement of the handle, or in the case of the '699 Patent, the projecting portion: "As measured from the base of the shaft or projecting portion."

FN7. See, Discussion, 2.b. *supra*.

h. " Fillet "

	TraFFix's Proposed Construction	Bent's Proposed Construction
"Fillet"	A band or strip.	A concave junction formed where the two diameters meet.

TraFFix contends that its proposed construction should be adopted because it relies on the dictionary definition of this term that is most appropriate for the patents. Likewise, Bent argues that its construction is best because it utilizes what Bent believes is the proper dictionary definition. TraFFix, however, criticizes Bent's construction on the grounds that its concave limitation ignores the plain language of the patent. Bent also finds fault with TraFFix's construction because it relies on a dictionary definition intended for clothing apparel and finds no support in the patent documents.

The Court agrees with TraFFix that, although Bent's "concave junction" element stems from a dictionary definition of "fillet", it improperly narrows the scope of this term because at no point do the relevant patents state that a fillet provides a concave junction. The only description of this term in the patents is that it "provides a generally smooth transition" between diameters. ('732 Patent, 3:15-17; 11 :8-10; '673 Patent, 6:44-46.) In fact, not even all of the "architectural" definitions, from which Bent draws its construction of this term, require concavity. For example, the *Merriam-Webster* online dictionary's structural definitions of "fillet" include "a strip to reinforce the corner where two surfaces meet" and "a strip that gives a rounded appearance" to the junction formed where two surfaces meet. *Available at* www.merriam-webster.com. In addition, the Court believes that rejection of Bent's construction is called for because it would, without the necessary evidentiary support, limit this term to the preferred embodiments depicted in Figures 1 and 2 of the '732 Patent. *Rheox, Inc.*, 276 F.3d at 1327.

On the other hand, because it constitutes the plain and ordinary meaning, the Court finds that TrafFix's proposed construction of this term as "a band or strip" is acceptable. As noted above, *Merriam-Webster's* online dictionary defines, albeit with additional detail, a "fillet" as a "strip". Available at www.merriam-webster.com. This same dictionary also defines "band" as "a strip serving to join or hold things together", therefore rendering the terms sufficiently interchangeable. *Id.* The Court also finds that TrafFix's construction does not conflict with the context of the relevant patents, which simply require a "fillet" to serve as a transition region that "provides a generally smooth transition." ('732 Patent, 3:15-17; 11 :8-10; '673 Patent, 6:44-46.) Both a band and a strip can easily accomplish this task.

Accordingly, the Court adopts TrafFix's construction of "fillet".

i. " Interfering contact "

	TrafFix's Proposed Construction	Bent's Proposed Construction
"Interfering contact"	Should be literally construed.	Any contact that either hinders or impedes.

Bent seeks adoption of its construction on the grounds that it is consistent with the language of the patents, as well as the plain and ordinary meaning of this term. TrafFix, on the other hand, has failed to address the construction of this term in both its opening and reply briefs and, therefore, has offered no support for its suggestion that this term be literally construed.

The Court concludes that Bent's construction is appropriate. Not only does the Court find that this construction complies with the plain and ordinary meaning of the term "interfering contact", but it is also consistent with the context of the patents, which indicates that the interfering contact, which the patent improvements prevent, is what hinders or impedes the separation of the traffic delineators from their stacked position. (*See, e.g.*, '732 Patent, 1:62-2:3, 45-49.)

The Court, therefore, adopts Bent's construction of this term.

j. " Integrally molded "

	TrafFix's Proposed Construction	Bent's Proposed Construction
"Integrally molded"	Wholly or completely formed.	Molded as one piece.

The difference between the parties' proposed constructions centers around whether the handle and body portion are molded together as one piece, or whether each is wholly, but separately, molded. According to Bent, its construction, which requires the body portion and handle to be molded as one piece, relies on what it believes is the proper view of the relationship between the handle and the body portion, as well as the prosecution history of the '673 Patent. TrafFix, on the other hand, contends that its construction is appropriate because nothing in the specification or claims requires that the handle and body portion be molded as one piece. Thus, in Traffix's view, Bent's proposed construction would impermissibly limit the scope of the patents.

The Court finds that the proper construction of this term is Bent's because the patent language dictates that the handle and the body portion be molded together in one piece. The best examples of this are in Claim 9 of the '732 Patent and Claim 1 of the '673 Patent. In both instances, when describing the handle, the claims state "said handle being integrally molded with said body portion." ('732 Patent, 10:51-52; '673 Patent, 5:66-67.) The telling aspect of this phrase is the use of the word "with" in conjunction with the term "integrally molded". This combination eliminates the possibility that the handle and the body portion are each wholly but separately molded and makes clear that the patentee intended for the handle to be molded as one piece *with* the body portion.

Accordingly, the Court adopts Bent's construction of "integrally molded".

k. " Axially oriented "

	TrafFix's Proposed Construction	Bent's Proposed Construction
"Axially oriented"	Generally parallel with the longitudinal axis of the body portion.	Specifically oriented on the longitudinal axis of the body portion.

TrafFix requests adoption of its proposed construction on the grounds that it embodies the common and ordinary meaning of this term, as well as the plain language of the patent. Bent criticizes TrafFix's construction saying that it is an unjustified rewriting of the claims. Its own construction, it contends, is better because it takes into account the requirements of the figures and the specifications, as well as the objectives, of the patents-in-suit.

The Court, however, disagrees with Bent. TrafFix's construction does not rewrite the claim, but, rather is a proper interpretation of this term in the context of the patent. According to the online version of the *American Heritage Dictionary*, "axial", which is the root of "axially" means "located on, around or in the direction of the axis". Available at www.bartleby.com. Similarly, the online version of the *Merriam-Webster Dictionary* defines "axially" as "situated around, in the direction of, on, or along an axis". Available at www.merriam-webster.com. Based on these definitions, the Court concludes that the plain and ordinary meaning of "axially" is broader than that suggested by Bent, "specifically oriented on [an] axis". For this reason and because there is nothing in the patent that requires the shaft to be situated directly on the longitudinal axis of the body portion FN8, the Court adopts TrafFix's construction.

FN8. The Court finds that the convenient full hand gripping improvement can still be achieved with a shaft not situated precisely on the longitudinal axis of the body portion.

l. " Without substantial contact "

	TrafFix's Proposed Construction	Bent's Proposed Construction
"Without substantial contact"	Should be literally construed.	"Substantial": largely considerable or significantly great. None of the fingers have significant contact with the knob either by way of pressure on the fingers or the extent to which the fingers actually touch the knob portion.

Bent asserts that its construction, which prohibits significant contact between the fingers and the knob,

either by way of pressure or touch, is necessary in light of the prosecution history of the '673 Patent, in which the patentee distinguished the patent from prior art on the basis that it avoids pinching or cramping a person's fingers. Traffix, however, contends that Bent's construction should not be adopted because it would impermissibly narrow the scope of the claim. Instead, Traffix encourages the Court to literally construe this term.

Traffix's criticism of Bent's proposal is correct: Bent's construction includes much more detail than is required by the plain and ordinary meaning of this term and, in doing so, impermissibly narrows the scope of the claim. While "without substantial contact" does require that none of the fingers have significant contact with the knob by way of the extent to which they actually touch the knob, the Court finds that a construction of this term need not include a limitation regarding permissible pressure on the fingers. It is conceivable that even "without substantial contact" between a person's fingers and the knob, whatever contact there is could involve significant pressure without pinching or cramping the fingers as required by the prosecution history of the '673 Patent. Moreover, dictionaries define "contact" in terms of touching or tangency, not pressure. *Merriam-Webster Online Dictionary*, available at www.merriam-webster.com; *American Heritage Online Dictionary*, available at www.bartleby.com. Accordingly, the Court finds that it must reject Bent's construction.

The Court, therefore, is left with Traffix's suggestion that this term should be literally construed. The Court agrees with Traffix that no further definition of this term is required. The term "without substantial contact" in the context of the '673 Patent is clear and unambiguous because it simply means what it says: that the handle enables "gripping of said safety delineator *without substantial contact* of the knob portion by any of said fingers." No further elaboration is required. The Court, therefore, literally construes this term.

m. " Textured "

	Traffix's Proposed Construction	Bent's Proposed Construction
"Textured"	Should be literally construed.	Not smooth.

Bent contends that, because the purpose of the "textured" outer surface of the shaft is to "provide an improved gripping surface", this term must be construed as "not smooth" so as to facilitate gripping. Traffix, on the other hand, insists that this term need only be literally construed.FN9

FN9. Traffix did not address this term in its Opening Brief, but, rather waited to raise it in its Reply. Because Traffix did not respond to Bent's arguments in its Reply, but instead advanced new contentions of its own, the Court declines to consider these arguments because their untimeliness has unfairly precluded Bent from responding.

The Court agrees with Bent that there is some, if small, ambiguity in this term and therefore construction is warranted.FN10 Because a smooth-textured shaft would not facilitate gripping as required by the patent, the Court finds that Bent's construction of "textured" as "not smooth" is necessary to achieve this goal. Accordingly, the Court adopts Bent's construction of this term.

FN10. While in common parlance "textured" typically means "not smooth", because something may be

described as "smooth-textured", in order to prevent any future disputes, the Court errs on the side of providing a clear interpretation of this term at this time.

n. " Stiffeners "

	TraFFix's Proposed Construction	Bent's Proposed Construction
"Stiffeners"	Molded protrusions. [Molded portions that reinforce the handle.]	Molded protrusions that reinforce the shaft portion and prevent buckling of the shaft or handle.

As Bent points out in its Reply, both parties agree that "stiffeners" are "molded protrusions." The difference between the parties' constructions, therefore, is whether additional detail describing the function of the molded protrusions is necessary. According to Bent, this is required because any construction that lacks such detail is incomplete. In its Opening Brief, TraFFix appears to concede this point, offering an entirely new construction that describes the function of the "stiffeners": "molded portions that reinforce the handle". (TraFFix's Opening, p. 20.) For this reason, and because the Court finds that a construction that merely describes the physical properties of the "stiffeners" without specifying their function is not complete, the construction that the Court adopts must include this detail.

While Bent's proposal, as well as TraFFix's most recent offering, both provide some form of this, the Court, finds that Bent's construction is preferable because it specifically identifies the part of the handle, the shaft, that the stiffeners reinforce to prevent buckling. In addition, its description of the "stiffeners" as protrusions, rather than portions, is more accurate. The Court, therefore, adopts Bent's construction of "stiffeners".

o. " Projecting portion "

	TraFFix's Proposed Construction	Bent's Proposed Construction
"Projecting portion"	Should be literally construed.	A handle portion that protrudes from the top end of the body portion.

Bent argues that its construction, which essentially equates the "projecting portion" in Claims 1 and 11 of the '699 Patent with the "handle" claimed in all four patents is consistent with this patent's specification and drawings. TraFFix, however, opposes Bent's construction on the grounds that it violates the doctrine of claim differentiation because Claims 2 and 12, which are dependent on Claims 1 and 11, explicitly claim a "projecting portion" comprised of "a handle". ('699 Patent, 6:16-17; 7 :5-6.)

The Court agrees with TraFFix that Bent's construction violates the doctrine of claim differentiation by rendering Claims 2 and 12 redundant. 5A Chisum on Patents, s. 18.03[6] (1999). Although this doctrine is only a guide from which the Court may depart, the Court finds no reason to do so here. ATP Corp., 159 F.3d at 541. Construing the "projecting portion" of the safety delineators in the '699 Patent to be a "handle" is not necessary because the main objective of the claims in which this term appears is preventing safety delineators from jamming together when stacked, which does not require a handle. ('699 Patent, 5:59-6:14; 6 :41-7 :3.) Accordingly, the Court rejects Bent's construction.

The Court is, therefore, left with TraFFix's suggestion that this term be literally construed. Because the term "projecting portion" in the context of this patent is clear and unambiguous, the Court agrees with TraFFix

that further clarification of this term is neither necessary nor would it provide any further assistance in this litigation. Accordingly, the Court adopts Traffix's proposal and construes this term literally.

p. " Abut "

	Traffix's Proposed Construction	Bent's Proposed Construction
"Abut"	Should be literally construed.	To touch at one end or side; lie adjacent thereto and in contact with.

Bent's construction of this term relies on a definition from the *American Heritage Dictionary* (Bent's Opening, Ex. T) and, according to Bent, is proper because it makes clear that, when stacked, the contact between the knob of a lower cone and the interior surface of an upper cone is not so great as to cause the two cones to jam or stick together. Traffix, on the other hand, insists that this term need only be literally construed.FN11

FN11. Once again, Traffix did not address this term in its Opening Brief, but, rather waited to raise it in its Reply. For reasons expressed in footnote 9, *supra*, the Court only considers those of Traffix's arguments that directly respond to those advanced by Bent.

Because Bent's construction is taken straight from the dictionary with very little alteration (only the addition of "thereto and in contact with", which does not alter its meaning), the Court finds that the proposed constructions are substantially identical FN12 and equally acceptable.FN13 Accordingly, while either construction would be appropriate, the Court elects, for the sake of simplicity, to accept Traffix's suggestion and to adopt a literal construction of this term.

FN12. The Court finds that a dictionary definition is essentially the literal construction of a term.

FN13. The Court finds that a literal, or dictionary, construction of this term is appropriate because there is nothing in the patents that would conflict with the plain and ordinary meaning of "abut" that such a construction will provide.

q. " Limit the extent "

	Traffix's Proposed Construction	Bent's Proposed Construction
"Limit the extent"	Should be literally construed.	The second delineator is prevented from sticking or jamming with the first one in a stacking relationship.

Bent proposes its construction on the grounds that this term only has meaning in the context of the claim if it is clear that its effect is to prevent the delineators from jamming or sticking in a stacking relationship. On the other hand, Traffix, once again, simply insists that this term need only be literally construed,FN14 criticizing Bent's construction on the grounds that it impermissibly imports limitations from the specification.

FN14. *See*, footnote 11, *supra*.

The Court disagrees with Traffix because, although Bent's construction does narrow the claim, the limitation it provides is essential to achieve the objective of the patent: preventing the delineators from sticking and jamming together when they are stacked. ('712 Patent, Abstract.) Without this limitation, embodiments would be permitted that insufficiently limit the extent to which one delineator is received within the hollow interior of another delineator, allowing them to become stuck or jammed together. Because the two claims in which this term appears are the only independent claims in the '712 Patent, their ability to achieve this objective of the patent must be preserved. Accordingly, in order to ensure the achievement of the '712 Patent's stacking improvement, the Court adopts Bent's construction of "limit the extent".

Conclusion

The Court construes the disputed terms as follows:

TERM	CONSTRUCTION
"Body portion"	An upstanding, generally elongate article of manufacture having a top end and a bottom end and being of sufficient size and visibility to perform the function of a traffic delineator.
"Top end"	Upper boundary beyond which the body portion does not extend.
"Handle"	A shaft and a knob.
"Full hand gripping"	All of the fingers and the palm of the hand of an average adult are in contact with the delineator while it is being grasped.
"Wrapped thereabout"	Clasping the delineator so that there is contact between the delineator and all of the fingers and the palm of the hand of an average adult.
"Shaft"	The long thin portion of the handle.
"Knob"	A generally round or rounded protuberance.
"At least [number] inches"; "At least/approximately [number] inches long"	As measured from the base of the shaft or projecting portion.
"Fillet"	A band or strip.
"Interfering contact"	Any contact that either hinders or impedes.
"Integrally molded"	Molded as one piece.
"Axially oriented"	Generally parallel with the longitudinal axis of the body portion.
"Without substantial contact"	Literally construed.
"Textured"	Not smooth.
"Stiffeners"	Molded protrusions that reinforce the shaft portion and prevent buckling of the shaft or handle.
"Projecting portion"	Literally construed.
"Abut"	Literally construed.
"Limit the extent"	The second delineator is prevented from sticking or jamming with the first one in a stacking relationship.

C.D.Cal.,2005.

Traffix Devices, Inc. v. Bent Mfg. Co.

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