United States District Court,
D. Connecticut.

DYMO COSTAR CORPORATION,
v.
SEIKO INSTRUMENTS USA, INC.

No. 3-00-cv-4 JHC

March 20, 2000.

RULING ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [DKT. # 3]

HALL**.**

I. INTRODUCTION

When plaintiff filed this action, it also moved this court to enter a preliminary injunction. A hearing on that motion was held on March 8 and 9, 2000, after the parties had engaged in some discovery. At issue is whether the defendant's label products infringe on a patent held by plaintiff. Based upon the following findings of fact and conclusions of law, and the standards to be applied at the preliminary injunction stage, the court concludes that preliminary injunctive relief in the form set forth below should enter.

II. FINDINGS OF FACT

1. The plaintiff, Dymo Costar Corporation ("Dymo"), is a corporation duly organized and existing under the laws of the State of Delaware. Dymo has its principal place of business in Greenwich, CT. Dymo has been developing and marketing apparatus and labels for automatic printing of addresses and other information since 1988.

2. The defendant, Seiko Instruments USA, Inc. ("Seiko") is a corporation organized and existing under the laws of the State of California. Seiko is duly registered and licensed to do business in the State of Connecticut. Seiko has a regular and established place of business in Branford, Connecticut. Seiko's Business and Home/Office Division develops and markets "SmartTools" line of compact peripheral devices for use with personal computers and communications systems. Seiko also produces specialty label printers and labels.

3. On January 4, 2000, United States Letters Patent No. 6,010,156 ("the ' 156 Patent") were issued to Dymo as the assignee of the named inventor thereof, David L. Block, for an invention entitled "A COMBINED ADDRESS AND POSTAGE LABEL AND SYSTEM FOR PRODUCING THE SAME." The plaintiff remains the owner of the ' 156 Patent. Plaintiff introduced its 30383 and 30384 label products for printing internet postage in the summer of 1999. The 30383 and 30384 products are embodiments of claim 1 of the '156 Patent. The 30383 label product is also an embodiment of claim 2 of the '156 Patent. From their introduction, Dymo has continued to offer for sale and sell the 30383 and 30384 label products.

4. Seiko introduced its "SLP-Postage" label product for printing internet postage in about September 1999. Since that introduction, Seiko has offered for sale and sold SLP-Postage labels.

5. Postage meters, which have been in use for many years, apply printed indicia of postage value in lieu of traditional adhesive paper stamps. Other technology for automated processing of mail includes barcode printing and reading apparatuses. By printing and reading barcodes as indicia for address information, or postage information, mailers and the United States Postal Service ("USPS") can implement automatic mail processing systems that reduce cost and improve the efficiency of mail handling.

6. With the advent of widespread access to the internet and World Wide Web, interest arose regarding the possibility of delivering postage via the internet ("Internet Postage"). In July 1996, the USPS established the Information Based Indicia Program ("IBIP"), a working group charged with developing standards and timetables for implementation of an internet-delivered postage system. Because the sale of postage is the USPS's principal source of revenue, and because of the importance of assuring proper delivery and printing of metered postage, and preventing fraud and other undesirable uses of postage meters, the USPS has always closely regulated the conditions under which metered postage could be used. The IBIP embodied a similar approach toward closely supervising implementation of internet-delivered postage.

7. Internet Postage promises potentially significant improvements in convenience and efficiency for both the USPS and its users. By purchasing postage on a personal computer via the internet, for use by a printer attached to the computer, a user could avoid the need to travel to the post office to purchase stamps. If the postage purchase and output system could also be integrated with the user's word processing, address database, and printing functions for the user's other business documents (and in particular, the user's correspondence), the user could generate a letter, find and attach the proper recipient address, and generate an appropriate address label and postage indicia, all at the same personal computer workstation. Such a procedure would be even more convenient than the use of a conventional postage meter. Although it may also be replenished with additional postage units by telephone without traveling to the post office, a conventional postal meter still requires the user to perform a number of different transactions on a number of different machines for letter and address label generation and postage purchase and application.

8. The USPS had assumed that only inkjet or laser printers with a printing resolution of 300 Dots Per Inch ("DPI") or greater could produce barcodes of sufficient quality for accurate scanning. Cooperative efforts and work by USPS personnel and consultants and experts from the label, printer, and postage meter industries demonstrated to the USPS that label printers which use thermal printing means, such as those produced for years by Dymo and Seiko, could produce barcodes of sufficiently-readable resolution for use with the proposed Internet Postage system. The USPS accepted Dymo's thermal printers as part of the first USPS-approved output system for Internet Postage.

9. The USPS's IBIP process of formulating Internet Postage standards and approving vendors was a lengthy one. To achieve this approval, both E-Stamp and Stamps.com had to prove that their proposed Internet Postage delivery system, and the software that would be used by each end user to download and use such postage, met the stringent IBIP technical standards. The 1996 USPS specification discusses printing postage indicium and a related recipient's address on label(s), as "an integral unit." PX6, at 3-9.

10. In August 1999, the USPS determined that two companies, E-Stamp Corporation ("E-Stamp"), and Stamps.com, Inc. ("Stamps.com"), would be approved as initial vendors of Internet Postage. E-stamp and

Stamps.com began to sell Internet Postage in October 1999. They are currently the only USPS-approved vendors of Internet Postage.

11. Dymo was involved in the IBIP process. Dymo planned to manufacture both a label printer and labels. It was seeking USPS approval, e.g., of the LabelWriter XL Plus and LabelWriter Turbo models, as well as the DYMO LabelWriter EL60, and EL TURBO models and labels therefor (the "Dymo Labels") ultimately introduced to the market and sold as DYMO LabelWriter product numbers 30383 (the "30383 product") and 30384 (the "30384 product") (collectively, the "Dymo System") that would be fully compatible with the Internet Postage standards. The USPS officially approved the Dymo printers in July 1999 and the Dymo System in September 1999, for use with the delivery of Internet Postage, following a process that started in March 1998 and involved satisfaction of the USPS's testing requirements for the label. Approval of Dymo's label design alone took over 15 months.

12. The Dymo label design approved by the USPS is an embodiment of the invention patented in the '156 Patent. Dymo's printer/label combination is the first to be approved by the USPS. Both E-Stamp and Stamps.com support the Dymo printers and Internet Postage labels in their software and describe those Dymo products on their respective web sites, e.g., as compatible for use with their respective Internet Postage systems. CompUSA currently sells Dymo's postage labels.

13. In or about May 1997, Seiko's General Manager met a representative of E-Stamp, which was in the process of developing its system in which postage could be downloaded from the Internet, and then printed together with addresses on labels. Seiko then began a working relationship with E-Stamp, in which the two companies collaborated to achieve product compatibility, as well as approval of Seiko's printers and labels by the USPS. In August 1997, Seiko attended a public meeting of the USPS regarding its IBIP, and one of its employees joined a working committee chaired by Block, inventor of the '156 Patent. Efforts were made to print and scan postage indicia on Seiko's shipping labels with Seiko's SLP 220 printer. By September 1998, Seiko designed a smaller label than its standard shipping label, in order to accommodate a standard # 10 envelope. That label size is currently used by Seiko in its commercial postage labels and is considered by Seiko to be a prototype for its current postage labels. However, the Seiko labels were not in "integral field" as required by the USPS.

14. In May 1999, E-Stamp informed Seiko that the USPS had revised its specification to require a fluorescent stripe on postage labels used for first-class mail on standard # 10 envelopes. The USPS decided that such fluorescent stripes were necessary for its optical scanning equipment to be properly aligned with the postage labels on standard # 10 envelopes. To avoid confusion with address labels, the USPS proscribed such fluorescent stripes on address labels. In order to comply with the USPS' revised specification, Seiko printed fluorescent stripes on every other label, and then placed black boxes only behind those labels. With such placement of black boxes, commencement of printing is synchronized with a label having a fluorescent stripe, and ceases when the next black box is sensed (assuming no more labels await printing). On or about August 12, 1999, Seiko's postage labels were approved by the USPS. Seiko's printers were approved by the USPS in October 1999.

15. David Block made his first drawing of a label embodying claim 1 of the ' 156 patent between May 22 and May 29, 1997. On September 24, 1997, the application for the '156 patent was filed. On about February 16, 1999, the U.S. Patent and Trademark Office mailed an Office communication to the attorneys of record in U.S. Patent Application 08/1935453, which was received by the attorneys on about February 25, 1999. The Office communication as mailed contained a two page "Notice Of References Cited," FORM PTO-892,

prepared by Examiner Frances Han and dated February 10, 1999. This Office communication, as mailed by the Office, contained a copy of nineteen references in said FORM PTO-892, including U.S. Patent No. 5,801,944, issued to Kara listed on "Page 2 of 2."

16. Patentee Block first became aware of U.S. Patent No. 5,801,944 no earlier than June 7, 1999. The attorneys for Block and Dymo first became aware of U.S. Patent No. 5,801,944 no earlier than February 25, 1999. The Examiner cited Kara "4 as prior art on February 16, 1999. There is no evidence that Block, the plaintiff, or their attorneys knew about the subject matter of the ' 944 patent prior to that date.

17. In connection with its defense, Seiko relies on FIG. 1A and 16A of the Kara "4 patent. United States Patent No. 5,717,597 (" '597 patent") was issued to Kara on February 10, 1998, from an application filed on October 11, 1995. A copy of Kara U.S. Patent 5,801,944 is in the official U.S. Patent And Trademark Office file of Block U.S. Patent 6,010,156. The Kara "4 patent identifies the patent application which issued as the Kara '597 patent. Compare PX52 ("4 Patent), front page at [63], with PX53 ('597 Patent), front page at [21].

18. The disclosure of the Kara '597 patent with respect to its FIG. 16A is the same as the disclosure of the Kara "4 patent with respect to its FIG. 16A. FIG. 1 of another Kara patent, U.S. Patent 5,682,318, is the same as FIG. 1A of the Kara "4 patent.

19. Before issuing a Notice of Allowance of the Block Application 08/1935453, Examiner Monica Smith updated the prior art search in the classes and subclasses previously searched by Examiner Han. Before issuing a Notice of Allowance of the Block Application 08/1935453, Examiner Monica Smith performed an interference search in the prior art classes and subclasses previously searched by Examiner Han. Based on the record before the court, neither Examiner who prosecuted the Block patent application overlooked the Kara ' 944 patent or misunderstood its subject matter,

20. Neither Block, the plaintiff, nor their attorneys had knowledge of the subject matter of any Kara patent prior to February 16, 1999, such as to call into play a duty to disclose such matter to the Patent Office. Block's notebook entry in December of 1997 of the patent number of Kara '318 Patent appears with the words "label printer." (The '318 Patent is in fact titled "System and Method for Storing Postage in a Computer.") Block did not know any more about the '318 Patent than what he wrote down.

21. On January 4, 2000, the plaintiff gave the defendant written notice of its infringement of the '156 Patent by reason of its making, having made, offering for sale, selling, and using the SLP-Postage label product.

22. The plaintiff has invested, and continues to invest, money as well as research and development and engineering resources in bringing its Internet Postage-related products to the market, and thereafter in promoting such products in the market.

23. It is in the public interest to protect the efficient orderly operation of the USPS's Internet Postage business.

III. CONCLUSIONS OF LAW

The court has subject matter jurisdiction of this action pursuant to 28 U.S.C. s.s. 1331 and 1338. The court has *in personam* jurisdiction over the defendant and venue is proper pursuant to 28 U .S.C. s.s. 1391 and 1400(b).

A. ***Standards and Burdens***

As the moving party, Dymo has to establish its right to a preliminary injunction in light of four factors: (1) a reasonable likelihood of success on the merits; (2) irreparable harm if the injunction were not granted; (3) the balance of the hardships; and (4) the impact of the injunction on the public interest. Polymer Techs., Inc. v. Bidwell, H.A., 103 F.3d 970, 973 (Fed.Cir.1996); Nutrition 21 v. United States, 930 F.2d 867, 869 (Fed.Cir.1991). The Federal Circuit has required that a trial court engage in "an evaluation and balancing of the four above-listed factors and the circumstances surrounding each ... [N]one may be ignored" before granting a preliminary injunction. Illinois Tool Works, Inc. v. Grip-Pak, Inc., 906 F.2d 679, 681 (Fed.Cir.1990); *see also* Payless Shoesource, Inc. v. Reebok Int'l Ltd., 998 F.2d 985, 988 (Fed.Cir.1993) ("In deciding whether a moving party is entitled to preliminary injunctive relief under [35 U.S.C. s. 283], a district court must consider [the four factors])."

In order to demonstrate a reasonable likelihood of success, Dymo must show that, in light of the presumptions and burdens that will inhere at trial, it will likely prove that Seiko infringes its patent. Dymo's patent is presumed valid and enforceable. 35 U.S.C. s. 282. Seiko bears the burden of proof on each of its invalidity theories. Panduit Corp. v. Dennison Mfg. Co. 810 F.2d 1561, 1569-70 (Fed.Cir.1987). At a preliminary injunction stage, Dymo must show that Seiko has failed to raise a substantial question of invalidity. *See* H.H. Robertson, Co. v. U.S. Deck, Inc., 820 F.2d 384, 387 (Fed.Cir.1987) (overruled on other grounds by Markman v. Westview Instruments, Inc. 52 F.3d 967 (Fed.Cir.1995)).

[T]he presumption does not relieve a patentee who moves for a preliminary injunction from carrying the normal burden of demonstrating that it will likely succeed on all disputed liability issues at trial, even when the issue concerns the patent's validity. At this preliminary stage, the trial court does not resolve the validity question but rather must, as the court did here, make an assessment of the persuasiveness of the challenger's evidence, recognizing that it is doing so without all the evidence that may come out at trial. The district court cannot be held to have erred in deciding that the patentee failed to make a sufficient showing of likelihood of success required to support a preliminary injunction where the evidence presented in support of invalidity raises a substantial question, although the defense may not be entirely fleshed out.

Given the time constraints within which an accused infringer must usually respond with evidence to a motion for preliminary injunction, in this case within a few weeks, a fully comprehensive presentation of its defenses cannot reasonably be required. Because severe time constraints are usual, the Supreme Court has recognized that a motion for preliminary injunction must customarily be decided "on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." University of Texas v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981). Indeed, such a record does not usually allow for a reliable resolution of the merits. While it is not the patentee's burden to prove validity, the patentee must show that the alleged infringer's defense lacks substantial merit. New England Braiding Co. v. A.W. Chesterton Co. 970 F.2d 878, 882-83 (Fed.Cir.1992) (citations and footnotes omitted).

If Dymo clearly establishes the first factor, by making a "clear showing" of both validity and infringement, it is entitled to a rebuttable presumption in its favor regarding the second factor. See Polymer Techs., 103 F.3d at 973; Smith Int'l, Inc. v. Hughes Tool Co., 718 F.2d 1573, 1581 (Fed.Cir.1983). If the presumption arises, Seiko then has the burden to produce evidence sufficient to establish absence of actual irreparable harm. *See* Polymer Techs., 103 F.3d at 974.

B. ***Likelihood of Success***

In assessing plaintiff's likelihood of success, the court must address the issue of patent validity. In that regard, the court must first construe the patent and then, in light of that construction, determine if there is literal infringement or infringement under the doctrine of equivalents. *See* Baxter Healthcare Corp. v. Spectramed, Inc. 49 F.3d 1575, 1582 (Fed.Cir.1995).

1. Validity

In response to the presumption of validity, Seiko asserts there are substantial questions about the validity of Dymo's patent on two grounds. First, it claims invalidity based on anticipation under Section 102 and obviousness under Section 103, both of Title 35 of the United States Code. Second, it asserts that the assignor/inventor, Block, engaged in inequitable conduct by violating his duty of candor toward the Patent Office. 37 C.F.R. s. 1.56. The court will address each argument in order.

a. Anticipation. For a claim to be patentable, it must be novel within the meaning of 35 U.S.C. s. 102. The claimed subject matter must not be identically disclosed, or "anticipated," by prior act. *See* Atlas Powder Co. v. Ireco, Inc., 190 F.3d 1342, 1346 (Fed.Cir.1999). To prove a patent claim invalid as anticipated by prior art, Seiko must present "clear and convincing evidence" on which a jury could conclude that a single patent, publication, or publicly used device contained each and every element of the claim. Applied Med. Resources Corp. v. United States Surgical Corp., 147 F.3d 1374, 1378 (Fed.Cir.1998) (applying "each and every element" rule to uphold rejection of anticipation charge). "[T]he claimed invention, as described in appropriately construed claims, must be the same as that of the [prior art] reference, in order to anticipate." Glaverbel S.A. v. Northlake Mktg. & Supply, Inc., 45 F.3d 1550, 1554 (Fed.Cir.1995).

In making this argument, Seiko places great reliance on the Kara '597 patent. FN1 However, that patent does not disclose the claimed "strip of segmented labels" in the patent in suit. The ' 156 patent specification makes clear that the "strip" correlates with a "continuous roll" (col. 2, line 62) of successive labels, separated by perforations defining fields. Kara himself was unable to identify any actual disclosure of a "continuous roll" or strip of label material in his ' 597 patent or his ' 944 patent. Kara Depo. at 56-57. He further testified that he never created a continuous roll or strip prototype of the label format illustrated in Fig. 16A of the ' 597 patent, but rather created prototypes using single sheet printers. Id. at 60. He gave similar testimony as to his ' 944 patent. Id. at 67-68, 72. Indeed, Mr. Kara (the holder of numerous patents) testified that he was "not aware of" any prototype built by himself or E Stamp that "include[d] the use of a perforated strip of segmented self-adhesive labels." Id. at 79.

FN1. The Examiner cited Mr. Kara's "4 patent as prior art against the Block patent application. By Kara's own testimony, Figures 16A and 16B of each of the '597 and "4 patents, and the description thereof within each specification, are precisely "the same." Kara Depo. at 20. Further, the ' 944 patent is a continuation-in-part of the '597 patent and there are no meaningful differences elsewhere in any portion of the specifications of the respective Kara patents that are of significance to the patentability of the claimed '156 patent invention. Compare PX31, 52 & 53.

The Kara '597 and "4 patents also cannot anticipate Claim 1 because they do not disclose "perforations defining a plurality of fields" as defined and claimed in the '156 patent. While Fig. 16A of the "4/'597 patents shows dashed lines indicating "kiss cuts" for peelable label parts ('597 Patent, col. 17, lines 3-6; "4 Patent, col. 18, lines 40-43), these are not "perforations" as defined in the '156 patent. A "plurality of fields"

along a strip is nowhere shown or contemplated in Fig. 16A, and even if it were, there is no disclosed way in which the "kiss cuts" could define or functionally separate, individual fields of labels. See '156 Patent, col 2, lines 66-67. The Kara "4/'597 disclosures contain nothing suggesting that the "kiss cuts" could serve as optical recognition or registration means to delineate fields or sets of labels for an electronic printer used in conjunction with the Kara Fig. 16A label. FN2 See ' 156 Patent col. 3, lines 1-3. The court concludes that Seiko has failed to raise a substantial question that a single product or reference in the record before this court can be shown to have contained each and every element of Claim 1 of the ' 156 Patent. Thus, there is no anticipation. This court holds that Dymo has satisfied its burden of showing that Seiko's defense under 35 U.S.C. s. 102 lacks substantial merit.

FN2. The Seiko "prototype" versions of the internet postage/address labels do not anticipate. See DE 202. They are a continuous strip and they do contain perforations (as properly construed), for the back of each label piece bears a black mark. However, these perforations do not define a plurality of fields (each field or set comprising a number of individual labels). Rather, they define a plurality of single labels.

b. Obviousness. When no single prior art reference discloses each and every limitation of a patent claim in suit, an alleged infringer may invalidate the claim under Section 103 by presenting clear and convincing evidence that the differences between the claimed invention and prior art are such that the invention as a whole would have been obvious to one of ordinary skill in the art at the time the invention was made. Atlas Powder Co. v. E.I. du Pont de Nemours & Co., 750 F.2d 1569, 1573-74 (Fed.Cir.1984). It is a basic principle of patent law that no patent should be granted which withdraws from the public domain technology already available to the public. See Graham v. John Deere Co., 383 U.S. 1, 6 (1966). "Obviousness is a question of law based on underlying factual inquiries including: (1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the prior art and the claimed invention; and (4) extent of any objective indicia of non-obviousness." Winner Int'l Royalty Corp. v. Wang, 202 F.3d 1340, 1348 (Fed.Cir.2000).

i. Scope and Content of the Prior Art and Difference Between It and the Claimed Invention.

Seiko argues that the incorporation of a postage label in conjunction with a mailing label is obvious, being taught by several patents, including Kara ' 944/'597 and Walz '393 and the USPS regulations. Some of the prior art, e.g. the Kara "4/'597 disclosure, does show multiple labels on a single sheet for printing postage and indicia. Some of the prior art is of a different variety: it shows strips of labels with perforations separating individual labels, e.g. U.S. Patent No. 5,501,393 ("Walz '393"), which is the same product design embodied in plaintiff's products. See PX 76-77.

Proof of obviousness that is contingent upon combining multiple disparate prior art references requires "a showing of some teaching, suggestion, or reason to combine the references." Winner, 202 F.3d at 1348 (internal quotation marks and citations omitted). The "absence of such a suggestion to combine is dispositive in an obviousness determination." Gambro Lundia AB v. Baxter Healthcare Corp., 110 F.3d 1573, 1579 (Fed.Cir.1997). Evidence of a suggestion, teaching, or motivation to combine prior art references must include a "clear and particular" showing that the multiple references could or should be combined. Winner, 202 F.3d at 1349.

Here, Seiko offers the deposition of Jeanne Santomauro as the basis to find a suggestion to combine a shipping label of Seiko, which is the same design but larger size than the Seiko SLP-IRL labels, with the

label depicted in Kara ' 994/'597 Fig. 16A, to obtain a continuous-strip version of Kara Fig. 16A. However, Santomauro could describe no more "clear and particular" motivation to make such a combination than her conviction that "I just know it." Santomauro Depo. at 126. FN3

FN3. Santomauro also testified that, even with this combination, one could not determine which postage would go with which address. Santomauro Depo. at 125.

Santomauro also purposed to find a suggestion to combine (1) Kara Fig. 16A, and (2) a roll-based label, within the USPS draft IBIP specification promulgated in October 1996. *Id*. at 123-24. Santomauro was unable to articulate the basis in the USPS document for the suggestion she perceived other than the IBIP's requirement of printing the delivery address and postage indicium as "an integral unit." *Id*. However, the Kara figure in question depicts only a single sheet form and does not suggest a roll or strip. Further, prior art such as the Kara "4/'597 disclosure and Berry '699, whose detailed disclosures, illustrations and prototypes show label sheets and do not show label strips or rolls, teaches away from the '156 patent's strip-based structure. In *re* Gurley, 27 F.3d 551, 553 (Fed.Cir.1994) (observing that a prior art "reference will teach away if it suggests that the line of development flowing from the reference's disclosure is unlikely to be productive of the result sought by the applicant").

Seiko urges this court to find that it was an obvious step from (a) the USPS's requirement for printing postage indicia and address as "an integral unit" to (b) devising a USPS-compliant label medium so as to have fields or sets (i.e. "integral units") of grouped postage/address labels functionally separated by perforations on a strip. However, Seiko worked over a two year period to develop the infringing label design. Although it began work on a label in mid-1997, it was not until May of 1999 that Seiko placed (on the back label side) a single black "perforation" mark at the beginning of a label for postage and deleted the black "perforation" mark on the back of its address label portion. See PX 107. Seiko's previous use of labels whose "perforations" did not define fields (as claimed in the '156 patent) led to the very "confusion and mistake with respect to disassociating address and postal indicia" that the ' 156 patent sought to, and did, solve. Id.

The court concludes that the evidence cited by Seiko does not disclose the claimed '156 patent structure combining (1) a perforated strip of segmented labels with (2) the perforations defining a plurality of fields or sets (each field containing a separate address label and postage label), with the further feature that (3) the strip is adapted for use with a computer driven printer, all of which is adapted for printing address information and USPS approved postal indicia in appropriate labels within each field.

ii. Level of Ordinary Skill in the Art

Plaintiff Seiko offered the deposition testimony of Santomauro as an expert on who is the hypothetical person of ordinary skill in the art in question. *See generally* In re GPAC, Inc., 57 F.3d 1573, 1579 (Fed.Cir.1995). Dymo objected to her testimony on several grounds. The court does not find that Santomauro's testimony is admissible on this topic: she testified she had no opinion on, *inter alia,* the level of skill of this hypothetical person. Santomauro Depo., at 63, line 12. See *generally, e.g.,* Bansch & Comby, Inc. v. Barnes-Hind/Hydroserve, Inc., 796 F.2d 443, 448 (Fed.Cir.1986). However, even if the court were to find her testimony admissible, and shortcomings such as this raised by Dymo to go only to the weight of her testimony, the court does not find her testimony to be helpful in support of Seiko's position. She failed to analyze the obviousness issues as to the limitations of claim 1 in view of the definition explicitly set forth in

the '156 Patent specification (at col. 2, line 64 to col. 3, line 3). Id. at 120. Further, she was unable to point to any "clear and particular" suggestion to combine various disparate prior art pieces. Id. at 123-28. Hindsight second-guessing as to combinations that would have been "obvious to try" is inappropriate because section 103 explicitly requires that obviousness *vel non* be judged as of " *the time the invention was made*." 35 U.S.C. s. 103 (emphasis supplied). *See also* ATD Corp. v. Lydall, Inc. 159 F.3d 534, 546 (Fed.Cir.1998) ("Determination of obviousness cannot be based on the hindsight combination of components selectively culled from the prior art to fit the parameters of the patented invention"). The combination of Kara "4, Kara '597, Kara '318, and/or Berry ' 669 involves the exercise of hindsight from the disclosures of the Block ' 156 patent. Santomauro's testimony does not suggest otherwise on this issue. Thus, even if her testimony is admissible, it is not supportive of Seiko's position on this element of obviousness.

iii. Secondary Considerations of Nonobviousness

Against this "backdrop," secondary considerations are utilized "to give light to the circumstances surrounding the origin of the patented subject matter." See Graham v. John Deere Co., 383 U.S. 1, 17-18 (1966); Winner 202 F.3d at 1350 (finding that commercial success of patented product spoke to its nonobviousness). Objective criteria of nonobviousness include commercial success, long felt but unsolved needs, and failure of others. Graham, 383 U.S. at 17. The record shows that Dymo's patented labels have enjoyed commercial success in the few months they have been on the market. Further, the '156 label design met the need for a label format that complied with the USPS requirements and that precluded printing the postage or address information on the wrong label, a result which Seiko did not achieve until May 1999.

The statutory presumption of validity inures to Dymo's benefit. Seiko has fallen short of raising a substantial question of the validity of Dymo's patent under the obviousness doctrine. The court concludes, based on the record before it, that Dymo has demonstrated that Seiko's defense of obviousness, like that of anticipation, lacks substantial merit.

c. Inequitable Conduct

Seiko also argues that the inventor, David Block, engaged in inequitable conduct before the PTO by "withholding disclosure" of allegedly-material prior art, the Kara "4/'597 and '318 patents, with an intent to mislead the PTO. Allegations of inequitable conduct are generally disfavored. In Burlington Indus ., Inc. v. Dayco Corp., 849 F.2d 1418 (Fed.Cir.1988), the Federal Circuit stated:

[Charges of inequitable conduct] destroy the respect for one another's integrity, for being fellow members of an honorable profession ... A patent litigant should be made to feel, therefore, that an unsupported charge of "inequitable conduct in the Patent Office" is a negative contribution to the rightful administration of justice.

Id. at 1422. In keeping with the disfavored character of inequitable conduct charges, to render a patent claim unenforceable for inequitable conduct, a defendant at trial must prove by clear and convincing evidence that prior art not disclosed to the PTO was material to patentability of the claims and that the non-disclosure resulted from an intent on the part of the applicant to mislead the PTO. See Hebert v. Lisle Corp., 99 F.3d 1109, 1115 (Fed.Cir.1996).

i. Non Disclosure of Material Art Did Not Take Place

Prior art is not material if it is merely cumulative or is no more material than other references already before the PTO Examiner; there is no duty to disclose a reference that is of the same or less materiality as what is

already disclosed. *See* Scripps Clinic & Research Found. v. Genentech, Inc., 927 F.2d 1565, 1582 (Fed.Cir.1991); Halliburton v. Schlumberger Tech. Corp. 925 F.2d 1435, 1440 (Fed.Cir.1991). The Kara '318 patent was cumulative to the art before the PTO in the prosecution history and to the Kara "4/'597 patents. The immateriality of the '318 reference is further made clear by comparing it to the patent disclosure, which was before the PTO. See PX 51-52. The only description of printing labels in the '318 Patent is in the disclosure that) when labels are printed, it "may be desirable" not to print addresses. See PX51, '318 Patent col. 8, lines 4-12. Manifestly, this disclosure teaches away from the invention of Block in '156, which requires that a related address label and a postage indicia label are always printed *together*.

As to the alleged non-disclosure of the Kara "4/'597 references, materiality does not come into issue because there was no evidence of knowing non-disclosure by the applicant. The first knowledge that Block had of the "4 patent was when it was cited to him via a 1999 PTO Office Action citing the ' 944 patent as prior art (albeit not relying upon it for a claim rejection). *See* PX 8 at p. 124 (PTO Form 892 as sent to Dymo counsel accompanying PTO Office Action, February 16, 1999, listing the Kara "4 patent on page 2 of 2). FN4

FN4. The '597 Patent discloses the same FIG. 16A as the "4. The '597 Patent specification concerning FIG. 16A is verbatim to that of the "4 Patent. Compare PX52, col. 18, lines 31-43, with PX53, col. 16, line 61col. 17, line 6.

Seiko argues that the "4/'597 references were not cumulative to the art considered by a second Examiner who took over responsibility for the '156 prosecution sometime after the February 16 Office Action. This argument is unfounded on the present record. Seiko cites to the PTO file as it now exists, PX67, which is missing the second page of the Form PTO 892, in which the "4 Kara patent was listed by the first Examiner. Seiko argues this suggests that the second Examiner must not have been aware of the "4 patent. However, a physical copy of the entire "4 patent is contained within the '156 patent prosecution file as kept in the PTO. See PX67. Any Examiner assuming responsibility for the '156 prosecution could have, and would have, investigated the file wrapper and discovered the "4 reference. See 37 C.F.R. s. 1 .104(a) ("On taking up an application for examination ... the examiner shall make a thorough study thereof and shall make a thorough investigation of the available prior art relating to the subject matter of the claimed invention"). In this case the second Examiner took the step of conducting a further updating prior art search (as well as an interference search for pending patent applications that might overlap with the '156 application) on July 28, 1999. See PX4 and 5 initialed "MS" *(i.e.,* Examiner Monica Smith).

Further, a second Examiner who takes over an application from a first Examiner is entitled and expected to presume that the first Examiner's search merits full faith and credit, and that the first Examiner's rejections were based upon the most applicable prior art. See Manual of Patent Examining Procedure ("MPEP") s. 706.04 (directing that new Examiner should generally give "full faith and credit" to prior search and action of the previous Examiner, and should not take an entirely new approach to the application unless circumstances so compel). The "4 patent disclosure was one which the first Examiner did not even deem worthy to base a rejection. See PX 39 and 40 (Feb. 16, 1999 Office Action, sent to Block's attorney by PTO, basing s. 102 rejections on several pieces of prior art other than the "4 patent, but referring to "4 patent in aggregate with other unrelied-upon art as "art made of record and not relied upon [and] considered pertinent to Applicant's disclosure"). Given that the first Examiner was under an obligation to "cite the best references at [her] command" in "rejecting claims for want of novelty," it is clear that the first Examiner considered the Kara "4 reference, included it in her Office Action as of tangential relevance, but did not deem it to be *as* relevant as the other references upon which she explicitly founded her statutory claim rejections. 37 C.F.R.

s. 1.104(c)(2).

Although the second page of the PTO Office Action is no longer in the patent file, it is pure speculation to conclude, as Seiko urges this court, that the second Examiner was unaware of it. There is no evidence that the second Examiner did not encounter the full-text copy of the Kara "4 patent which, pursuant to PTO Rules, was required to be, and was in fact, included within the file wrapper along with all other previously-cited references. See MPEP s. 707.05(A).

e. Intent to Deceive the PTO

If an inventor has the legitimate subjective belief that his conduct is not deceptive, then even behavior that is, objectively viewed, grossly negligent or grossly reckless conduct, but without culpable intent, does not of itself meet the requisite showing of intent to deceive. *See* Halliburton, 925 F.2d at 1442-43. Negligent conduct only supports an inference of intent when, viewed in light of all the evidence, the conduct is culpable enough to require a finding of intent to deceive. *Id*. (citing Kingsdown Med. Consultants, Ltd. v. Hollister, Inc. 863 F.2d 867, 876 (Fed.Cir.1988)). The court finds that Dymo has shown that Seiko's defense of fraud on the PTO/inequitable conduct lacks substantial merit on the record before this court.

First, the court accepts Block's testimony that he did not know what the Kara '318 patent related to, despite a brief reference to it in his notebook. As to the "4 reference, it is clear that there can be no deceptive intent in a decision, even a knowing one, not to re-disclose art to which the PTO already has formally cited as prior art. *See* ATD Corp. v. Lydall, Inc., 159 F.3d 534, 547 (Fed.Cir.1998). Both Block or his counsel first learned of the "4 disclosure from a PTO Office Action that cited the "4 reference as prior art. Finally, there is no evidence Block knew of the Kara '597 Patent.

Based on the record before it, the court concludes that, like the defenses of anticipation and obviousness, the alleged defense of inequitable conduct lacks substantial merit.

2. Claim Construction

A determination of patent infringement requires a two-step analysis. "First, the claim must be properly construed to determine its scope and meaning. Second, the claim as properly construed must be compared to the accused device or process." Carroll Touch, Inc. v. Electro Mechanical Sys., Inc. 15 F.3d 1573, 1576 (Fed.Cir.1993). Claim construction is a question of law. *See* Markman v. Westview Instruments, Inc., 52 F.3d 967, 979 (Fed.Cir.1995) *(en banc), aff'd.,* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996).

When construing the claims of a patent, a court principally consults the evidence intrinsic to the patent, namely, the claims themselves, the written description portion of the specification, and the prosecution history, *See* Vitronics Corp. v. Conceptronic, Inc. 90 F.3d 1576, 1582 (Fed.Cir.1996). When intrinsic evidence unambiguously delineates the scope of the patented invention, resort to extrinsic evidence, including expert testimony, is unnecessary. *See* id. at 1583.

Initially, the court looks to the words of the claim to define the scope of the patented invention. A technical term used in a patent is construed as having the meaning that it would be given by persons experienced in the field of the invention, unless it is apparent from the patent or prosecution history that the patentee used the term with a different meaning. *See* Hoechst Celanese Corp. v. BP Chemicals Ltd., 78 F.3d 1575, 1578 (Fed.Cir.1996).

Next, the court reviews the patent specification "to determine whether the inventor has used any terms in a manner inconsistent with their ordinary meaning." Vitronics, 90 F.3d at 1582.

The specification acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication. Markman, 52 F.3d at 979. As we have repeatedly stated, "[c]laims must be read in view of the specification, of which they are a part." Id. at 979, The specification contains a written description of the invention which must be clear and complete enough to enable those of ordinary skill in the art to make and use it. Thus, the specification is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term. Vitronics, 90 F.3d at 1582.

Claim 1 of the '156 patent reads:

A computer generated mailing label comprising:

a perforated strip of segmented self-adhesive labels, said perforations defining a plurality of fields wherein each field comprises a separate address label and a separate postage label to be affixed to an item to be mailed, the strip being adapted for use with a computer driven printer wherein the printer is adapted to print an intended recipient's address on the address label and a postal service approved postage indicia on the postage label in a preselected one of said fields.

The initial claim construction issue before the court is whether the use of the phrase "said perforations defining" in Claim 1 invokes a "means-plus-function" element under 35 U.S.C. s. 112, s. 6 . FN5 Having reviewed the claim and specification at issue, the court concludes that the phrase "said perforation defining, ..." is a means-plus-function claim, when read in conjunction with the definition of "perforations" in the specifications. See col. 2, line 65 to col. 3, line 3. The word as used in this claim is defined more broadly than its dictionary meaning, which would be a structure if so limited to the latter. *See* Cole v. Kimberly Clark, 102 F.2d 524, 531 (Fed.Cir.1996). Although the court recognizes that it is generally not appropriate to read into a claim the function of a particular example(s) found in the specification, *see Rodime, supra* 174 F.3d at 1302, the court concludes that it should do so here where the inventor clearly did not intend to limit this claim to the plain, ordinary and structural meaning of a word used in the claim. *See* Intellicall, Inc. v. Phonometrics, 952 F .2d 1384, 1387-88 (Fed.Cir.1992), quoting Lear Siegler, Inc. v. Aeroquip Corp., 733 F.2d 881, 889 (Fed.Cir.1984).

FN5. Section 112, para. 6 provides as follows:
An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

35 U.S.C. s. 112, para. 6.
The use of the word "means" in a claim element FN6 raises a presumption that the element falls within s. 112, para. 6. Rodime PLC v. Seagate Technology, Inc., 174 F.3d 1294, 1302 (Fed.Cir.1999). This presumption has but two exceptions: "First, a claim element that uses the word 'means' but recites no function corresponding to the means does not invoke s. 112, para. 6. Second, even if the claim element specifies a function, if it also recites sufficient structure or material for performing that function, s. 112,

para. 6 does not apply." *Id*. (internal citation omitted).

FN6. In this case, read in from the specification.

Here, neither exception to the presumption applies. The first exception does not apply because the claim element includes the corresponding function of "defining the individual fields." Nor does the second exception apply. Under such cases as Unidynamics Corporation v. Automatic Products International, 157 F.3d 1311, 1319 (Fed.Cir.1998), and Cole v. Kimberly Clark Corporation, 102 F.3d 524, 530 (Fed.Cir.1996), an element must recite a detailed structure to be removed from the reach of s. 112, para. 6. While an element need not contain an "exhaustive recitation" in order to be excluded from s. 112, para. 6, it must disclose "sufficient structure to perform entirely the claimed function [s]." Rodime 174 F.3d at 1304 (internal quotation marks omitted). Here, the element of Claim 1 at issue discloses "some non-exclusive examples of structure." See col. 2, line 5 to col. 3, line 3. Such disclosure is insufficient to remove the element from the reach of s. 112, para. 6. *See* Unidynamics, 157 F.3d at 1319 (holding use of structural term "spring" to be insufficient disclosure to avoid application of s. 112, para. 6).

Therefore, the court must interpret this element of Claim 1 according to the "structure, material, or acts described in the specification and equivalents thereof." 35 U.S.C. s. 112, para. 6. In so doing, the court may look to all parts of the specification, including, *inter alia,* the sections detailing the background, summary, and preferred embodiment of the invention. Signtech USA, Ltd. v. Vutek, Inc. 174 F.3d 1352, 1356-57 (Fed.Cir.1999). The court will do so mindful that use of means-plus-function language does not vitiate the requirement of s. 112, para. 2 that a claim "particularly point[ ] out and distinctly claim[ ] the subject matter which the applicant regards as his invention." 35 U.S.C. s. 112, para. 2; *see* In re Donaldson Co., 16 F.3d 1189, 1995 (Fed.Cir .1994). Even when "one employs means-plus-function language in a claim, one must set forth in the specification an adequate disclosure showing what is meant by that language." *Id*.

The court construes "said perforations defining ..." as the structure of holes, serrations, or dark lines that enable a printer to recognize (in order to group the address and postage label for each mailpiece within their own field) the beginning and end of each field of labels.

The remainder of Claim 1 is not expressed as means plus function. Therefore, the court construes them using general principles of claim construction. See p. 31-33, *supra*. The court construes the other elements of Claim 1 of the Block ' 156 patent is as follows:

(a) "strip of ... self-adhesive labels." The meaning is clear from the ordinary import of the constituent words and from '156 patent Fig. 1 and col. 2, lines 62-64 ("the strip (101) is shown to be a continuous roll (103)"). The court construes this to mean one label continuing after the other, that will adhere on their own.

(b) " 'segmented." The ordinary and customary meaning of segmented is "broken into pieces." The '156 patent specification confirms that, in the context of self-adhesive labels, "segmented" simply means "cut into pieces so as to be individually removable from the label backing." See, e.g., col. 3/1.11-13, 41-42 & Fig. 1 (referring to "four segmented self-adhesive labels (109, 111, 113, 115) ... which may be separated" and in turn depicting these four labels as adjacent, but not connected, pieces on the label strip. The court construes this word to mean separate from one another, and individually removable.

(c) "a plurality of fields." The specification makes clear that a "field" of labels is simply a set "contain[ing]

multiple labels to be associated with a single item of mail." Col. 3/1.3-5. Figure 1 also shows that this field (item (107)) is made up of the "segmented self-adhesive labels" placed adjacent to one another and spaced from another similar set or field of labels. The court therefore construes this to mean more than one set, each set containing multiple labels.

(d) "wherein each field comprises a separate address label and a separate postage label to be affixed to an item to be mailed." This claim limitation is clear based on its ordinary and customary meaning. "The resultant group of labels within the field will thus comprise a unitary group of labels which may be separated and affixed to a single item to be mailed." '156 Patent, col. 3, lines 40-42. The court construes this phrase to mean that each set of multiple labels ("each field") contains at least two separate labels, one for address and one for postage.

(e) "the strip being adapted for use with a computer driven printer." This limitation is self-explanatory. *See* id. at col. 4, lines 43-47, 54-56 ("The printer is capable of feeding and printing on the continuous perforated strips (214) delineating fields of labels ... The printer may be dedicated label printer ... or may be any other type of printer capable of receiving and printing on continuous perforated sheets"). The court construes this to mean that the strip is capable of being fed into, and printed upon, by a printer controlled by a computer.

(f) "wherein the printer is adapted to print an intended recipient's address on the address label and a postal service approved postage indicia on the postage label in a preselected one of said fields." As to the "adapted to print" portion of this limitation, the specification describes the printer as "capable of receiving from the computer and printing on the appropriate label within each field of labels the recipient address and a USPS approved postage indicia of the proper postage amount." Id. at col. 4, lines 47-50. The specification contains nothing suggesting that the particular combination of hardware, firmware, and/or software that renders the printer able to do this task is required. Rather, if any combination of such renders the printer "capable" of such proper printing, the printer is "adapted for" such printing. The court construes this aspect of the claim to mean that the printer is capable of placing the postage information of the label designed for postage and the address information on the label designed for the address.

3. Infringement

Literal infringement of a s. 112, para. 6 limitation requires that the relevant structure in the accused device perform the identical function recited in the claim and be identical or equivalent to the corresponding structure in the specification. *See, e.g., Al-* Site Corp. v. VSI Int'l, Inc., 174 F.3d 1308, 1320-21 (Fed.Cir.1999), Pennwalt Corp. v. Durand-Wayland, Inc., 833 F.2d 931, 934 (Fed.Cir.1987) (en banc). Court decisions emphasize that infringement depends on a showing of *both* identity of function and equivalency of means. See *e.g.,* King Instruments Corp. v. Perego, 65 F.3d 941, 945-46 (Fed.Cir.1995) ("[F]or a means-plus-function limitation to read on an accused device) the accused device must employ means identical or equivalent to the structures, material, or acts described in the patent specification. The accused device must also perform the identical function as specified in the claims"). Therefore, where either (1) the function of a means-plus-function limitation absent in an accused device, or (2) the means is not or equivalent, there can be no infringement of the claim. *See* Intellical, Inc. supra 952 F.2d at 1388-89.FN7

FN7. For example, *in* Kimberly Clark Corp. v. Johnson & Johnson, 745 F.2d 1437 (Fed.Cir.1984), U.S. patent No. 3,672,371 described an invention for a sanitary napkin in which two parallel lines of adhesive were used (1) to seal the overlapping sheet that formed the napkin cover, and (2) to attach the napkin to the supporting garment. Id. at 1441. The wrapper in the accused device was joined by a single adhesive strip,

and had a second adhesive strip which was intended for the sole purpose of garment attachment (although it did seal a portion of the napkin's internal structure which the first adhesive strip also joined). The Federal Circuit upheld the trial court's finding of non-infringement, both literally and by equivalents, primarily because "defendants avoid infringement by not having at least two lines of adhesive both of which penetrate and seal both portions of the wrapper overlap." Id. at 1457.

The Seiko products at issue have a black line on the back of every other label on a continuous strip. Seiko claims the only function of the black line is to align the roll in the printer; the "defining" of the field of labels is accomplished by its software. However, without the black line that appears at the beginning of the next field (or set), Seiko admitted that its printer would not recognize the end of the field. Thus, it does perform the same function as the black lines claimed in the '156 patent. Further, Seiko uses the identical means, *i.e.,* "dark lines that can be optically recognized by an electronic printer used in conjunction with the continuous strip of labels." ' 156 Patent, col. 3, lines 1-3. Therefore, the court concludes that Dymo has made a clear showing of likelihood of success on the merits in establishing that Seiko's labels literally infringe Dymo's '156 Patent.FN8

FN8. Alternatively, the Seiko labels infringe Claim 1 under the doctrine of equivalents. For instance, if any doubt existed as to whether the Seiko black boxes are "perforations defining" fields of labels, the evidence from Seiko's witness showing that the black boxes are required for proper alignment of the printing of successive fields (or sets) of Seiko labels, and for beginning and ending a set, establishes that the Seiko labels' black boxes perform the "perforating/defining" function in substaintially the same way, and to achieve substantially the same result (*viz.,* confusion-free grouping of label segments for a mailpiece) as the claimed labels. *See* Warner Jenkinson Co., Inc. v. Hilton Davis Chem. Co., 520 U.S. 17, 39-40 (1997).

2. Irreparable Harm

Having made a clear showing of likelihood of success on the merits, Dymo is entitled to a presumption of irreparable harm. Polymer Techs., supra, 103 F.3d at 974. The presumption is rebuttable. *Id*. However, it places the "ultimate burden of production" on this issue at this stage on Seiko. *Id*. (quoting *Reebok,* 32 F.3d at 1556). Examples of evidence offered by an infringer to satisfy this burden are set forth in the *Polymer* decision: evidence the alleged infringer will soon cease; evidence the patent holder has freely licensed the invention; evidence the patent holder has delayed in bringing suit. *Id*. at 974.

Seiko offered no evidence of this type. It did not claim it intended to cease marketing its products, there is no evidence Dymo has granted licenses under the patent, and the record clearly establishes that Dymo did not delay, commencing suit on the day the patent issued, January 4, 2000.

Seiko did adduce evidence concerning the ability to determine monetary damages in this case. However, this effort is inadequate to rebut the presumption. First, the court is not persuaded that all monetary damages could be reasonably calculated.FN9 Second, it ignores the protection given by the patents, particularly in the circumstances present here. This patent has just issued. It relates to an entirely new market, in connection with the internet.

FN9. For example, although Seiko sales of the internet postage labels could be established, it is not clear that all sales of printers or unrelated labels achieved because of the availability of internet postage/address

labels could be reasonably determined.

Dymo's right to exclude Seiko from making and selling labels embodying the ' 156 patent labels is perhaps more critical at the present moment than it will be at any other time during the finite life of the patent, as it coincides with the initiation of the market for internet postage and affiliated products such as the Dymo Labels. In any business venture, gaining maximal customer goodwill, brand recognition and market share at an early stage is important. In the internet world, it is vital. The infancy of internet postage, and the opportunities it affords Dymo to gain market share for years to come as the sole legitimate initial supplier of USPS authorized labels designed for internet postage, is a scenario that will not repeat itself for Dymo. The difference in marketing a patented product such as the Dymo Labels on an exclusive basis, and marketing it in competition with an infringing product that offers the same innovative advantages, is obviously substantial.

Thus, Dymo has established, both by presumption and by evidence, that it will suffer irreparable harm. Seiko has not come forward with evidence that rebuts the presumption or that addresses Dymo's evidence of irreparable harm.

3. Balance of Hardships

Under this third factor, the court must balance the relative conveniences and inconveniences resulting from the denial or granting of a preliminary injunction.

Seiko does not point to any substantial equities in its favor. It claims essentially the same hardship Dymo claims-exclusion from an infant market when new customer relationships are forming. However, given the clear showing of likelihood of success on the merits, this is a hardship that Seiko is not entitled to avoid. Therefore, the court concludes this factor does not weigh in Seiko's favor.

4. Public Interest

The public interest is served by the protection of valid patents. *See* Smith Int'l., 718 F.2d at 1581; H.H. Robertson, Co., 820 F.2d at 391; Colonial Data Techs. Corp. v. Cybiotronics, Ltd., 1996 WL 875081 at (D.Conn.1996). The Federal Circuit has stated that "the focus of the ... public interest analysis should be whether there exists some critical public interest that would be injured by the grant of preliminary relief." Hybritech, Inc. v. Abbott Labs. 849 F.2d 1446, 1458 (Fed.Cir.1988). In other words, unless there appears to be a strong public interest affirmatively militating against injunctive relief, this factor presumptively weighs in the patentee's favor.

Here, no such countervailing interest exists. Seiko essentially makes a "pro-competition" argument as the basis for its public interest argument to deny an injunction. See Seiko Opposition (Dkt.# 27) at 32. However, the Constitution recognizes the grant of patent rights which are, *per se,* monopolies. See, e.g., E.I. du Pont de Nemours & Co. v. United States, 288 F.2d 904, 911 (Ct.Cl.1961). Seiko's public interest argument, in effect, assumes that Dymo's patent is invalid. If the court agreed with this assumption, it would agree with Seiko that the public interest favors fair competition. However, the court has found that Dymo will likely prevail on the merits in this case: its patent is valid and is infringed by Seiko. Thus, it is inapposite for Seiko to argue about "free market competition." Further, enjoining sales of the Seiko labels only after a full trial may have an unnecessary dampening effect on the overall market for internet postage if a substantial number of consumers have incurred sunk costs in Seiko supplies that could not then be used

without infringement. Solarex Corp. v. Advanced Photovoltaic Sys., Inc. 1995 WL 314742 at (D.Del.1995) ("The public interest is ... benefitted when disruption of the market is prevented or minimized"). In light of its earlier findings, the court finds this factor weighs in favor of granting a preliminary injunction.

CONCLUSION

Having addressed each of the four factors identified by the Federal Circuit, the court concludes that, on balance, the factors clearly weigh in favor of the granting of a preliminary injunction. Accordingly, Seiko is hereby restrained, until further order of the court, from making or selling its SLP-Postage label, samples of which were marked at the hearing as Plaintiff's Exhibit 78. This injunction shall be effective as soon after March 28, 2000 FN10 as Dymo has posted the bond to be ordered on that date.

FN10. Plaintiff is ordered to post a bond in connection with this preliminary injunction. Seiko is to provide Dymo with a proposed form of bond and bond amount by March 23, 2000. If the parties are in agreement, a stipulated order concerning the amount and form of bond shall be filed by noon (E.D.T.) on March 27, 2000. If the parties do not agree, Seiko shall file a Motion for the form and amount of bond it seeks in chambers by noon (E.D.T.) on March 27, 2000, and Dymo shall file its objection, and alternative form and/or amount of bond by noon (E.D.T.) on March 28, 2000.

SO ORDERED.

D.Conn.,2000.
Dymo Costar Corporation v. Seiko Instruments USA, Inc.