

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

APPLE INC. and NeXT SOFTWARE)	
INC. (f/k/a NeXT COMPUTER, INC.),)	
)	
<i>Plaintiffs,</i>)	No. 1:11-cv-08540
)	
v.)	
)	Judge Richard A. Posner.
MOTOROLA, INC. and MOTOROLA)	
MOBILITY, INC.,)	
)	
<i>Defendants.</i>)	

ORDER OF MARCH 30, 2012

I have before me Apple’s motion for reconsideration of my supplemental claims construction order of March 29. That order construed several means-plus-function terms in Apple’s U.S. Patent No. 7,479,949 and, in particular, identified the structure described in the patent’s specification that performed each of the functions. Apple asks me to reconsider my determination that an element of structure it pointed to in the patent’s specification as capable of performing claim 1’s “next item” function is not in fact capable of performing that function.

Apple’s motion is troubling. Apple makes two main arguments, and both rest entirely on flagrant misreadings of my March 29 order—even though the portion of that order relevant to the “next item” function is just over a page in length and covers ground well-trodden by the parties’ briefs.

Apple’s first argument, in its own words, is that “the Court incorrectly concluded that ‘there is no basis in either the claim language or the diagrams and descriptions’ for a finger swipe as a structure corresponding to the ‘next item’ heuristic. Order at 5.” The language of mine quoted by Apple comes from a different section of my order that dealt with a distinct function term from a distinct claim of the ‘949 patent (the function in claim 2 for determining whether a given finger contact on a touch screen device is a command to move an onscreen item or to shift the entire view). I did not make that point, or one like it, about the “next item” function and the horizontal finger swipe that

Apple seeks to associate with it. Indeed, I specifically recognized that the patent discloses a horizontal finger swipe gesture in relation to the next item command, and cited to the very portions of the patent's structure that Apple now asserts demonstrate my ostensible error. Apple argues that "the specification unquestionably discloses a horizontal swipe as corresponding structure that performs this [next item] function and expressly refers to the horizontal swipe as one of two alternative 'next item' heuristics"; but I said the very same thing in my order; Apple perceives disagreement where there is none. There can be no substantive response to this argument of Apple's, for it argues not against my order but against Apple's mirage of that order.

Ditto for Apple's second argument, that "the Court erroneously found that a horizontal finger swipe cannot be both a 'next item' heuristic (claim 1) and a 'horizontal screen scroll' heuristic (claim 10). Order at 4." At page 4 of my opinion I compare the next item heuristic not to claim 10's horizontal screen scrolling function, but to claim 1's diagonal translation function. (I make the point that Apple argued that a horizontal swipe could perform either command, and that if this is the case then the patent actually has no means of "determining" which "command" "the one or more finger contacts correspond to." See my order for a full account of this point.) Since both the diagonal translation function and the next item function are limitations of claim 1, Apple's arguments that "unlike the 'next item' heuristic, the 'horizontal screen scroll' heuristic appears nowhere in claim 1" and that "claim 9, from which claim 10 depends, makes clear that the claimed 'horizontal screen scroll' heuristic is used in a different application (web browser) than the 'next item' heuristic (photo album)" are simply irrelevant: I make very clear that my discussion is wholly internal to claim 1, on which claim 9 (which depends from claim 1) has no bearing. Motorola's brief made both the argument that I adopted and the argument that Apple thinks I adopted; but I ignored the latter argument of Motorola's, largely for the reasons Apple now advances.

Apple presumably spent a nontrivial amount of time drafting its order, and now I have done the same in responding to it. Yet it seems that Apple brought about this expenditure of scarce resources without first making a careful reading of the page or so of my order against which this motion is launched. Such inconsiderate sloppiness is unprofessional and unacceptable.

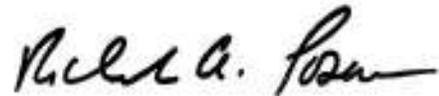
Only in the final passage of its motion does Apple make an argument that might not be talking past my order entirely: "The [next item and translation] commands also will be distinguished depending on the state of the underlying content. For example, in a photo album application, a horizontal swipe gesture will result in a transition to a different photo in a set of photos if the entire photo is shown on the display screen. Col.

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34:7–21. But, if only a portion of the image is shown on the screen (in other words, the photo is sized to be bigger than the display screen), a swipe gesture is interpreted to move the photo in a horizontal, vertical, or two-dimensional direction.”

I decline to consider the merits of this contention. Apple failed to advance it anywhere in its briefing of the construction of the ‘949 patent prior to this motion to reconsider. A motion to reconsider under Fed. R. Civ. P. 54(e) is an appropriate vehicle to explain to the judge that he or she has misunderstood the facts or the parties’ arguments, to object when the judge goes beyond the issues briefed by the parties and in doing so makes a mistake (I have not done so—the argument of mine that Apple challenges is drawn from pages 15–17 of Motorola’s brief), or to bring up newly discovered evidence or new arguments based on an intervening change in the applicable law. “Such problems rarely arise and the motion to reconsider should be equally rare.” *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990), quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983). A motion to reconsider may not be used to make an argument that could have been made in the original briefing of the underlying decision. *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1269–70 (7th Cir. 1996); *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987). By failing to raise this argument in claims construction briefing on the ‘949 patent, Apple has forfeited it. See *Innogenetics, N.V. v. Abbott Laboratories*, 512 F.3d 1363, 1371 (Fed. Cir. 2008) (“We review procedural issues not unique to patent law under regional circuit law. Absent extraordinary circumstances, the Seventh Circuit has stated that it rarely reaches forfeited arguments in civil litigation” (citations omitted).) The motion to reconsider is denied.



United States Circuit Judge

March 30, 2012