
In the
United States Court of Appeals
for the Federal Circuit

— ♦ —
Case No. 2010-1525
— ♦ —

INVENTIO AG

Plaintiff-Appellant,

v.

**THYSSENKRUPP ELEVATOR AMERICAS CORPORATION;
THYSSENKRUPP ELEVATOR CORPORATION, and; THYSSENKRUPP
ELEVATOR MANUFACTURING INCORPORATED**

Defendants-Appellees.

— ♦ —
**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

Case No. 1:08-cv-00874-ER

Judge Eduardo C. Robreno, presiding in the Eastern District of Pennsylvania

— ♦ —
**DEFENDANTS-APPELLEES' MOTION TO STRIKE PORTIONS OF
APPELLANT'S REPLY (GRAY) BRIEF**

NON-CONFIDENTIAL

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United States Court of Appeals
For The Federal Circuit

Defendants-Appellees Thyssenkrupp Elevator Americas Corporation, Thyssenkrupp Elevator Corporation, and Thyssenkrupp Elevator Manufacturing Incorporated (“TKE”) respectfully move this Court to strike the portions of Appellant Inventio’s Reply (Gray Brief) indicated below.

In accordance with Fed. Cir. R. 27(a)(5) Movant has discussed this motion with Appellant Inventio. Inventio has stated that it does not consent to the filing of the motion, that it will oppose the motion, and that it intends to file a brief in opposition to the motion.

Information on page 9 of this Motion, comprising deposition testimony of Paul Freifli and designated as **CONFIDENTIAL-ATTORNEY’S EYES ONLY** under the Protective Order in this case (A1 – A170), has been redacted.

I. INTRODUCTION

TKE recognizes that adverse parties to an appeal must be permitted wide latitude to express their arguments in whatever form they chose. However, that latitude is not unbounded – there are limits that fair minded advocates would recognize as crossing the line, such as “when an appellant has not dealt fairly with the court, [or] has significantly misrepresented the law or fact.” *Abbs v. Principi*, 237 F.3d 1342, 1345 (Fed. Cir. 2001).

In the present case, Inventio has crossed that line by including in its Reply Brief statements that seriously mischaracterize the law and TKE’s arguments, and

distort the record. And Inventio compounded its transgression by including the improper statements in its Reply Brief, knowing that TKE would have no opportunity for written reply.

Accordingly, for the reasons discussed below, these improper statements should be stricken from Inventio's Reply Brief.

II. ARGUMENT

A. Inventio raises a new and seriously misleading argument, not in its main brief.

In its Reply Brief, Inventio states:

By contrast, the corresponding structure for the "modernizing device" not simply a "general purpose computer." Instead, it is a specialized hardware device with various electrical components, including converter 361, signal generator 362 and signal receiver 363. A149. A photograph of one commercial embodiment of the modernizing device shows that it is not a "general purpose computer," but rather is a device intended to interface with existing elevator controllers. A475 (photograph of Schindler's "Schindler ID" commercial embodiment of the modernizing device); see also A451-457 (describing the structure and operation of the "Schindler ID" embodiment). Gray Brief at 23-24 (italics added).

* * *

Accordingly, the "modernizing device" is not a "general purpose computer" — in fact, it is not a "computer" at all. Instead, it is a hardware device designed to interface with existing elevator controllers. Therefore, this Court's holding in the Aristocrat line of cases is inapplicable here, because the "modernizing device" is not a "computer-implemented invention." Gray Brief at 24-25 (italics added).

This argument, that the “modernizing device” is “not a computer,” but a “hardware device,” is raised for the first time in Inventio’s Reply Brief, and was not addressed at all in Inventio’s Blue Brief. “Arguments raised for the first time in a reply brief are not properly before this court.” *United States v. Ford Motor Company*, 463 F.3d 1267, 1276 (Fed. Cir. 2006); *Smithkline Beecham Corporation v. Apotex Corporation*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) (“Our law is well established that arguments not raised in the opening brief are waived.”)

Moreover, the Inventio patents (Fig. 3 reproduced below) clearly show that the “modernizing device” contains a processor 365, which carries out the “computer program product.” A182, 9:41-42.¹

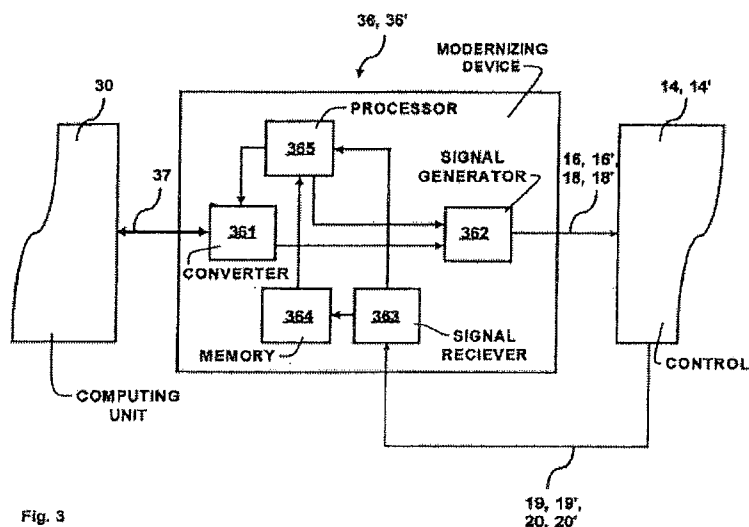


Fig. 3

¹ Previously, Inventio conceded that “[m]odernizing device 36 includes signal transmitters and receivers under the control of a processor,” and “[t]he function of converter 361 [part of the modernizing device] . . . may be performed by a commercially available transceiver in combination with a commercially available microprocessor.” A625, A628; *see also* A448, A451; A453-55 (admitting the microprocessor of converter 361 has to be programmed.)

However, in advancing its new argument that the “modernizing device” is “not a computer,” but only a “specialized hardware device,” Inventio deliberately omits processor 365 from the list of components making up its newly named “specialized hardware device” (Gray Brief at 23) to make it appear that the “modernizing device” has nothing to do with a computer. This is very misleading, since processor 365 actually controls converter 361 and signal generator 362.

Accordingly, the italicized statements quoted above should be stricken from Inventio’s Gray Brief.

B. Inventio misrepresents this Court’s *Aristocrat* decision

In its Reply Brief Inventio states:

“ThyssenKrupp’s reliance on Aristocrat is misplaced. First, Aristocrat involved a “computer-implemented invention.” Aristocrat, 521 F.3d at 1333. This Court defined a “computer-implemented invention” to be a claim in which the patentee “claim[s] a means for performing a particular function and then . . . disclose[s] only a general purpose computer as the structure designed to perform that function.” Id. (emphasis added). In ThyssenKrupp’s reliance on Aristocrat is misplaced. First, Aristocrat involved a “computer-implemented invention.” Aristocrat, 521 F.3d at 1333.” Gray Brief at 22 (italics added).

Nowhere in *Aristocrat* did this Court define a “computer-implemented invention,” either as Inventio says, or in any other way. Inventio’s “definition” is misleadingly fabricated by improperly cutting and pasting disparate statements:

- “[In cases involving] a computer-implemented invention [in which the inventor has invoked means-plus-function claiming, this court has consistently required that the structure disclosed in the specification be more than simply a general purpose computer or microprocessor.]” 521 F.3d at 1333.
- “[For a patentee to] claim[s] a means for performing a particular function and then [to] disclose[s] only a general purpose computer as the structure designed to perform that function [amounts to pure functional claiming]” *Id.*

Accordingly, the italicized statement quoted above should be stricken from Inventio’s Gray Brief. *See Laitram Corp. v. Cambridge Wire Cloth Co.*, 919 F.2d 1579, 1583 (Fed. Cir. 1990) (distorting cited authority sanctionable conduct.)

C. Inventio misrepresents TKE’s so-called “admissions”

Inventio blatantly mischaracterizes a number of TKE’s statements:

1. “*ThyssenKrupp admits that "Inventio acted as its own lexicographer" by giving an express definition for the adjectival modifier "computing," which further defines "unit." ThyssenKrupp Brief at 20.*” Gray Brief at 5.

TKE’s actual argument says nothing about a “definition for the adjectival modifier ‘computing’”:

- “Inventio admits (Blue Brief at 38) that it “acted as its own lexicographer” in naming the “computing unit” – it is thus a “coined term lacking a clear meaning such as ‘widget’ or ‘ram-a-fram.’” *Personalized Media*, 161 F.3d at 704.” Red Brief at 20.

2. “*ThyssenKrupp also admits that one "conventional" component of such a system is a "computerized elevator control" — i.e., a destination dispatching computer.* [referring to TKE’s Brief at 2] Gray Brief at 5.

* * *

"ThyssenKrupp admits that destination dispatching computers were "conventional elevator technology available long before Inventio applied for its patents." Gray Brief at 6.

* * *

"ThyssenKrupp admits that the "computing unit" is a "conventional elevator component available long before Inventio applied for its patents" — i.e., the "computerized elevator control" of a destination dispatch system. ThyssenKrupp Brief at 2-3." Gray Brief at 32, n.6

These arguments by Inventio blatantly mischaracterize TKE's statements, which do not "admit" that destination dispatching computers were "conventional," or that a "computing unit" was a "conventional elevator component." Rather, TKE stated:

In one type of common elevator control shown in Figure 1, the passenger enters an up-down hall call by pressing a button located on a wall in the lobby to go up or down. A2412. After entering the elevator car, the passenger selects the desired destination floor by pressing the appropriate numbered button in the elevator car. *Id.* The computerized elevator control then moves the car to the selected floor. *Id.*

Another conventional elevator technology available long before Inventio applied for its patents is called destination call control. . . . and the computerized elevator control moves the elevator car to the selected floor without the passenger having to push any buttons in the elevator car." Red Brief at 2-3.

3. *"ThyssenKrupp admits that algorithms for the computing unit were well-known in the art." Gray Brief at 32.*

This is not an "admission" by TKE at all, but a misleading conclusion by Inventio based on the two preceding sentences in Inventio's Brief:

ThyssenKrupp argues that Dr. Friedli's testimony only shows that "destination dispatch systems ... were known, not the algorithms described in the Inventio patents." ThyssenKrupp Brief at 54, ¶ 2. However, such "destination dispatch systems" necessarily include a computer that runs a destination dispatching algorithm. ThyssenKrupp Brief at 2-3 (destination dispatch includes a "computerized elevator control.") Gray Brief at 31-32.

Nowhere in TKE's Brief, particularly in the section cited by Inventio, is there any suggestion of the concept attributable to TKE. Inventio's statements are a blatant mischaracterization of what TKE actually said.

Accordingly, in view of the foregoing, the italicized statements challenged above from Inventio's Gray Brief should be stricken. *See Romala v. United States*, 927 F. 2d 1219, 1224 (Fed. Cir. 1991) (arguments based on misrepresentations and distortions of opponent's arguments is sanctionable conduct)

D. Inventio misrepresents TKE's arguments

1. In its Reply Brief Inventio states:

ThyssenKrupp argues that this case is distinguishable from LG Elecs., Inc. v. Bizcom Elecs, Inc., 453 F.3d 1364 (Fed. Cir. 2006) because, in LG, the processor and memory appeared in the claim language itself, whereas here, they appear in the specification's definition of "computing unit." *ThyssenKrupp Brief at 23. Gray Brief at 6.*

This is a blatant mischaracterization of TKE's argument, which says nothing about the specification's "definition" of "computing unit". What TKE actually said is:

"Computing unit" is also very different from the "control unit" of *LG Elecs* relied on by Inventio, as the district court in the present case

recognized (A88), because (as Inventio admits) the claim itself “provide[d] sufficient structure, namely a CPU and a portioned memory system for performing the stated function.” 453 F.3d at 1372. The claimed “computing unit” in the present case is devoid of this critical additional defining structure. This is far more than “form over substance” as Inventio asserts: the Inventio claims lack the “substance.” Red Brief at 23.

2. In its Reply Brief Inventio states:

ThyssenKrupp also argues that it was improper for Inventio to keep its actual source code secret. ThyssenKrupp Brief at 55, ¶ 3. Gray Brief at 30-31.

This is a blatant mischaracterization of TKE’s argument, which says nothing about any impropriety in keeping Inventio’s source code secret. What TKE actually said is:

3. “the patents don’t disclose critical parts of the “computing unit” algorithm because Inventio wanted to keep the algorithm secret (A2107, 101:9- A2108, 102:7; A2112, 128:7-21. Red Brief at 55.)

Accordingly, in view of the foregoing, the italicized statement above from Inventio’s Gray Brief should be stricken. *See Romala*, 927 F. 2d at 1224 (arguments based on misrepresentations and distortions of opponent’s arguments is sanctionable conduct)

E. Inventio misrepresents the record

1. In its Reply Brief Inventio states:

ThyssenKrupp also argues that Dr. Friedli thinks the destination dispatching algorithm is "neither relevant nor important," ThyssenKrupp Brief at 55, ¶ 5. However, Dr.

Friedli merely testified that the specifics of the algorithm are not relevant to the Patents-in-Suit, so long as it is a destination dispatching algorithm. A2110-2111, 125:22-126:25. Gray Brief at 31.

The second sentence quoted above is nowhere supported by Inventio's record citation, which appears in its entirety (Redacted):

Q.

MR. YANNEY:

Q.

A

Q.

A.

Q.

THE INTERPRETER:

A.

A2110, 125:22 – A2111, 126:25.


Inventio has simply created evidence to support its argument

Accordingly, in view of the foregoing, the italicized statements quoted above from Inventio's Gray Brief should be stricken. *See Romala* , 927 F. 2d at 1223 (misrepresenting facts to the court is sanctionable conduct); *Laitraim*, 919 F.2d at 1583 (briefs included statements of fact not supported by the record.)

III. CONCLUSION

As shown above, Inventio's Reply Brief contains a number of record distortions, manufactured facts and unsupportable legal arguments which should be stricken. This type of unfair and unnecessary advocacy "wastes the time of the court and of opposing counsel, and imposes unnecessary costs on the parties and on fellow citizens whose taxes support this court and its staff." *Chemical Eng'g Corp. v. Marol, Inc.*, 754 F.2d 331, 335 (Fed. Cir. 1984).

Respectfully submitted,



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CERTIFICATE OF INTEREST

Counsel for Appellees certifies the following:

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

ThyssenKrupp Elevator Americas Corporation;
ThyssenKrupp Elevator Corporation, and;
ThyssenKrupp Elevator Manufacturing Incorporated,

collectively referred to herein as “ThyssenKrupp.”

2. The name of the real party(s) at interest represented by me is:

ThyssenKrupp Elevator Americas Corporation;
ThyssenKrupp Elevator Corporation, and;
ThyssenKrupp Elevator Manufacturing Incorporated

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

ThyssenKrupp Elevator Manufacturing Incorporated is 100% owned by ThyssenKrupp Elevator Corporation, which is 100% owned by ThyssenKrupp Elevator Americas Corporation., which is 100% owned by ThyssenKrupp USA Inc., which is 100% owned by ThyssenKrupp AG, which is publicly traded on certain foreign stock exchanges, but is not publicly traded in the United States.

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

David E. Schmit, Frost Brown Todd LLC and
James M. Lennon, Womble Carlyle Sandridge & Rice PLLC

CERTIFICATE OF SERVICE


I hereby certify that two (2) copies of the attached Defendants-Appellees' Motion to Strike Portions of Appellant's Reply (Gray) Brief were sent by courier this 8th day of March, 2011 to:

Pierre R. Yanney
Strook & Strook & Lavan LLP
180 Maiden Lane
New York, New York 10038

I also certify that the original and three (3) copies of the attached Defendants-Appellees' Motion to Strike Portions of Appellant's Reply (Gray) Brief were sent by courier this 8th day of March, 2011 to:

Clerk
Court of Appeals for the Federal Circuit
Fourth Floor, Room 401
Howard T. Markey National Courts Bldg.
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Washington, D.C. 20439

March 8, 2011



David E. Schmit
Attorney for Defendants-Appellees