

Patent Law & Policy

Session 20

10/6/08

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Dow Chem. v. AVI (Fed Cir 2001)

- Polymer foam from non-CFC blowing agent
- Dow sues AVI, asserting three Park patents
- State of the art before 1984
 - `300 patent to Miyamoto
 - Filed 1968, issued 1974
 - Owned by JSP, non-party

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Dow cont'd

- AVI - “We were really first” / JSP’s licensee
- But AVI never filed a patent application

Step 1 - Patent Attacker shows prior inv’n

Step 2 - Patentee raises genuine issue of a/s/c

Step 3 - Patent Attacker refutes a/s/c

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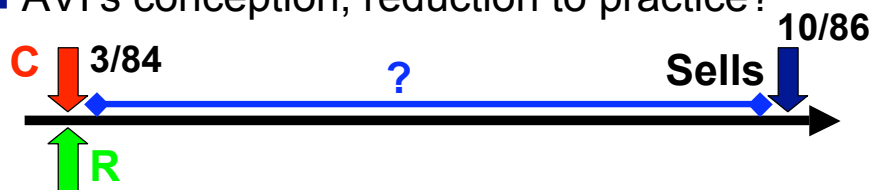
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Dow cont'd

- Park’s conception, reduction to practice?



- AVI’s conception, reduction to practice?



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Dow cont'd

- Dow : “ No one at AVI was an ‘inventor’ ”
 - “*Heard* and *Silvestri* say one can’t be an inventor without appreciating that one invented” ... ?
- Dow : “ Even if AVI was prior, it a/s/c ”
 - What does Dow rely on to show a/s/c ?
- Does a/s/c std differ if one ...
 - applied for a patent v. selling the subject matter?

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In re Moore (CCPA 1971)

- Remember Hafner ...
 - Prior art reference anticipates compound claim if the ref shows how to make the compound, even if not how to use it
- Neutralizing apparent § 102(a) reference ...
 - Must applicant show a use before ref’s date?
 - Remember Brenner v. Manson interference ...
 - Manson had to show utility before his rival’s date

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Moore cont'd

- Moore files on Nov 24, 1964 - new compound
 - Chem article published 11 months earlier
 - Article doesn't show a use for the compound
- PTO - Moore must show he knew a use before the article's publication date
- Court?
 - There is no interference rival here
 - "policy considerations [are] totally different"