

The opinion in support of the decision being entered today is not binding precedent of the Board.

Paper 240

Filed by: Merits Panel  
Mail Stop Interference  
P.O. Box 1450  
Alexandria, VA 22313-1450  
Tel: 571-272-9797  
Fax: 571-273-0042

Filed  
20 September 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

DOUGLAS R. **LOWY**,  
JOHN T. SCHILLER and REINHARD KIRNBAUER,

Junior Party,  
(Application 08/484,181)

v.

IAN **FRAZER**  
and JIAN ZHOU,

Senior Party.  
(Application 08/185,928)

Patent Interference 104,775 (Nagumo)

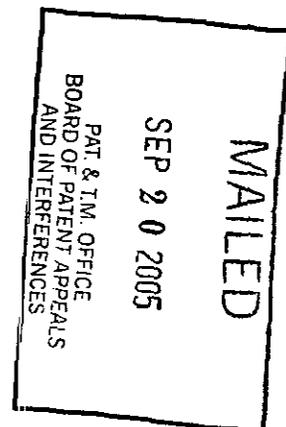
Before: MCKELVEY, Senior Administrative Patent Judge, LANE,  
TIERNEY, MOORE, and NAGUMO, Administrative Patent Judges.

PER CURIAM.

**Judgment - Merits - Bd.R. 127**

I. Introduction

1. The sole count in this interference is Count 3.
2. Lowy has been accorded the benefit for priority of the filing date of its application 07/941,371, which is 3 September 1992 (Lowy's date of constructive reduction to practice).



3. Frazer has been accorded the benefit for priority of the filing date of its PCT application PCT/AU92/00364 (FX 1028), which is 20 July 1992 (Frazer's date of constructive reduction to practice).

4. For the reasons giving in the opinion for the Board authored by Administrative Patent Judge Moore (Paper 239, Decision - Lowy Priority Date - Bd.R. 125(a)), which is mailed on the same date as this judgment, we held that Lowy failed to prove that it conceived or actually reduced to practice an embodiment within the scope of Count 3 prior to Frazer's date of constructive reduction to practice.

5. Thus, Lowy has failed to overcome the presumption that Frazer, as the senior party, is the first inventor.

6. Priority is awarded as to Count 3 **against** Lowy.

7. The net effect of the judgments in interferences 104,771 through 104,776 on each of the involved parties is summarized in Appendix 1, which is attached to this judgment.

#### IV. Order

For the reasons given above, it is

**ORDERED** that priority is awarded **against** Douglas R. Lowy, John T. Schiller, and Reinhard Kirnbauer as to Count 3, the sole count in this interference;

**FURTHER ORDERED** that Douglas R. Lowy, John T. Schiller, and Reinhard Kirnbauer are not entitled to a patent to claim 49 of application 08/484,181.

For the reasons given in the Decision on Preliminary Motions, Paper 149, it is

**FURTHER ORDERED** that Douglas R. Lowy, John T. Schiller, and Reinhard Kirnbauer are not entitled to a patent to claims 34-48 of application 08/484,181;

**FURTHER ORDERED** that Ian Frazer and Jian Zhou are not entitled to a patent containing claims 91, 92, 95 and 96 of application 08/185,928;

**FURTHER ORDERED** that the prior decisions in this interference are merged with this judgment.

**FURTHER ORDERED** that a copy of Paper 239, Decision - Lowy Priority Date - Bd. R. 125(a), shall be entered in the files of application 08/484,181 and application 08/185,928.

**FURTHER ORDERED** that a copy of Paper 238, Decision - Frazer Priority Date - Bd. R. 125(a), shall be entered in the files of application 08/484,181 and application 08/185,928.

**FURTHER ORDERED** that a copy of this Judgment shall be entered in the files of application 08/484,181 and application 08/185,928.



Interference 104,775  
Lowy v. Frazer

Paper 240

cc (via federal express):

Counsel for Rose

Michael L. Goldman, Esq.  
Edwin V. Merkel, Esq.  
NIXON PEABODY LLP  
Clinton Square  
Corner of Clinton Avenue & Broad Street  
P.O. Box 31051  
Rochester, N.Y. 14603

Counsel for Lowy

Brenton R. Babcock, Esq.  
Ned A. Israelsen, Esq.  
Nancy W. Vensko, Esq.  
KNOBBE, MARTENS, OLSON & BEAR LLP  
2040 Main Street, 14th Floor  
Irvine, CA 92614

Counsel for Schlegel

Elliot M. Olstein, Esq.  
CARELLA, BYRNE, BAIN, GILFILLAN, CECCHI,  
STEWART & OLSTEIN  
5 Becker Farm Road  
Roseland, N.J. 07068-1739

Counsel for Frazer

Beth A. Burrous, Esq.  
George E. Quillin, Esq.  
Stephen A. Bent, Esq.  
FOLEY & LARDNER  
3000 K Street, N.W., Suite 500  
Washington, D.C. 20007-5109

**APPENDIX 1**

**Introduction**

This appendix summarizes the net effect of the judgments in interferences 104,771 through 104,776 on each of the parties. This appendix is an executive summary only: the judgments and orders in each interference should be consulted for the legally binding determinations of the Board.

Interferences 104,771 through 104,776 are the six two-party interferences that were declared coincident with the administrative termination of the four-party interference 103,929.

Each party in each of the new interferences was authorized to serve each party in the original interference with copies of any papers filed in any of the new two-party interferences. Each two-party interference, however, was a proceeding complete unto itself, and was decided on the basis of the motions and arguments raised and evidence presented in that interference. Thus, a motion for judgment raised by party A against party B in interference 1 might be granted if A carried its burden of proof, while a motion for the same judgment, raised by party C against party B in interference 2, might be denied if C failed to carry its burden of proof. Similarly, if party D did not raise the motion for judgment against party B in interference 3, D would

not be advantaged and B would not be disadvantaged in interference 3 by the decision in interference 1.

Upon issuance of judgments in all the interferences, however, each party is subject to the logical union, in the Boolean-algebraic sense, of all the judgments. Simply put, a judgment in any interference that claim X is unpatentable to party A precludes that party from obtaining a patent to that claim.

#### **Judgments in the Interferences**

##### 104,771: Rose v. Lowy

Adverse judgment as to priority was entered against junior party Rose.

Accordingly, Robert C. Rose, William Bonnez, and Richard C. Reichman are not entitled to a patent to claims 35-37, 41-45, 48, 50, 52-57, 59, 61-65, 67-72, 75-77, 79-89 and 91 of application 08/207,309.

##### 104,772: Rose v. Schlegel

Adverse judgment as to priority was entered against junior party Rose.

Accordingly, Robert C. Rose, William Bonnez, and Richard C. Reichman are not entitled to a patent to claims 35-37, 41-45, 48, 50, 52-57, 59, 61-65, 67-72, 75-77, 79-89 and 91 of application 08/207,309.

104,773: Rose v. Frazer

Adverse judgment as to priority was entered against junior party Rose.

Accordingly, Robert C. Rose, William Bonnez, and Richard C. Reichman are not entitled to a patent to claims 35-37, 41-45, 48, 50, 52-57, 59, 61-65, 67-72, 75-77, 79-89 and 91 of application 08/207,309.

104,774: Lowy v. Schlegel

Adverse judgment as to priority was entered against junior party Lowy.

Accordingly, Douglas R. Lowy, John T. Schiller, and Reinhard Kirnbauer are not entitled to a patent to claims 48 and 49 of application 08/484,181.

104,775: Lowy v. Frazer

Adverse judgment as to priority was entered against junior party Lowy.

As a result of this judgment and the Decision on Preliminary Motions, Douglas R. Lowy, John T. Schiller, and Reinhard Kirnbauer are not entitled to a patent to claims 34-49 of application 08/484,181.

As a result of the Decision on Preliminary Motions, modified by the Decision on Reconsideration (Paper 229), Ian Frazer and Jian Zhou are not entitled to a patent to claims 91, 92, 95, and 96 of application 08/185,928.

104,776: Frazer v. Schlegel

Adverse judgment as to priority was entered against junior party Frazer.

As a result of this judgment and the Decision on Preliminary Motions, Ian Frazer and Jian Zhou are not entitled to a patent to claims 65-80 and 89-100 of application 08/185,928.

As a result of the Decision on Preliminary Motions, C. Richard Schlegel and A. Bennett Jensen are not entitled to a patent to claims 1-3, 10, 12, 13, 18, 19, 21, 26, 46, 47, and 50-66 of application 08/216,506.

**Summary**

As a result of decisions in this interference:

Robert C. Rose, William Bonnez, and Richard C. Reichman are not entitled to a patent to claims 35-37, 41-45, 48, 50, 52-57, 59, 61-65, 67-72, 75-77, 79-89, and 91 of application 08/207,309;

Douglas R. Lowy, John T. Schiller, and Reinhard Kirnbauer are not entitled to a patent to claims 34-49 of application 08/484,181;

Ian Frazer and Jian Zhou are not entitled to a patent to claims 65-80 and 89-100 of application 08/185,928;

C. Richard Schlegel and A. Bennett Jensen are not entitled to a patent to claims 1-3, 10, 12, 13, 18, 19, 21, 26, 46, 47, and 50-66 of application 08/216,506.

Thus, Schlegel may, subject to the determination of any civil actions or appeals arising from the decisions in the interferences to which it is a party, continue to seek a patent to claims 14, 16, and 23-25 of application 08/216,506.