

FS.COM INC. v. INTERNATIONAL TRADE COMMISSION, Appeal No. 2022-1228 (Fed. Cir. April 20, 2023). Before Moore, Prost, and Hughes. Appealed from ITC.

### Background:

Corning Optical Communications LLC ("Corning") filed a §337 complaint with the ITC alleging that FS infringed Corning's patents through importation of high-density fiber optic equipment into the U.S. for sale. The patents relate to fiber optic technology commonly used in data centers. The asserted claims recite an open-ended limitation such as "the fiber optic connection equipment configured to support a *fiber optic connection density of at least ninety-eight (98) fiber optic connections per U space*." FS argued such an open-ended density range was not enabled by the specification as it only disclosed the maximum density of 144 fiber optic connections per U space. The ALJ rejected FS' invalidity argument based on lack of enablement. FS petitioned for Commission review, and the Commission affirmed the ALJ's determination and issued a general exclusion order prohibiting importation of infringing high-density fiber optic equipment. FS appealed the Commission's determination that the patents are enabled.

### Issue/Holding:

Did the Commission err in holding that the open-ended limitation of the patents is enabled by the specification? No, affirmed.

### Discussion:

The Commission applied the two-part standard set out by the Federal Circuit's 2007 decision in *Anderson*<sup>1</sup>: "[O]pen-ended claims are not inherently improper... They may be supported if there is an inherent, albeit not precisely known, upper limit and the specification enables one of skill in the art to approach that limit." Although this *Anderson* test is infrequently applied, the parties agreed that this legal test governs their dispute.

FS argued the Commission erred in concluding the claims have an inherent upper limit based on its conclusory statement "some inherent limit exists" without identifying the concrete, exact upper limit (that is, without defining the precise scope of the claimed range). The Federal Circuit, however, noted that, read as a whole, the Commission's opinion determined that there is an inherent upper limit of about 144 connections per U space. The Commission found that skilled artisans would have understood, as of August 2008 which is the priority date of the patents, that densities substantially above 144 connections per U space were technically infeasible. This finding was supported by substantial evidence. The shared specification of the patents discloses the 144 connections per U space as the maximum density achievable using the LC-type adapters available as of the priority date of the patents. Corning's expert testified in support of such finding that no commercial product has achieved a greater density than 144 connections per U space using the LC-type adapters alone. Although FS argued that using the MDC-type adapters would have made it possible to achieve densities up to 432 connections per U space (thus evidencing no inherent upper limit in the claim), the court noted that such MDC-type adapters were not developed until 2019.

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<sup>1</sup> Anderson Corp. v. Fiber Composites, LLC, 474 F.3d 1361 (Fed. Cir. 2007).