

**FULL TEXT OF CASES (USPQ2D)**

All Other Cases

**Polaroid Corp. v. Eastman Kodak Co. (DC Mass) 17  
USPQ2d 1711 Polaroid Corp. v. Eastman Kodak Co.**

**U.S. District Court District of Massachusetts  
17 USPQ2d 1711**

**Decided January 11, 1991  
No. 76-1634-MA**

**Headnotes**

**REMEDIES**

**1. Monetary - Damages - Patents - In general (§ 510.0507.01)**

Federal district court order awarding damages against infringer of instant photography patents is amended pursuant to Fed.R.Civ.P. 60 to reflect clerical errors made in original calculation of award.

**Case History and Disposition:**

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**Patent infringement action filed by Polaroid Corp. against Eastman Kodak Co. On defendant's motion for reconsideration and amendment**

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**of final judgment ( 16 USPQ2d 1481 ), and on plaintiff's motion to correct clerical errors or to amend judgment. Opinion and judgment amended to reflect correction of clerical errors.**

## Opinion Text

**Opinion By:**  
**Mazzone, J.**

Order of Judgment issued in this case on October 12, 1990 [ 16 USPQ2d 1481 ]. Within the ten days allotted by the Federal Rules of Civil Procedure, Polaroid moved for reconsideration and amendment of the final judgment pursuant to Rules 59(e) and 52(b). On the same day, Kodak moved to correct clerical errors or to amend the judgment pursuant to Rules 60 and 59(e). The Court then permitted each party to file a response. The parties agree that there are two mathematical errors in the calculation of the interest award, and that these two errors constitute simple clerical mistakes. Both Polaroid and Kodak seek correction of additional "errors," however, with the net result that Polaroid's motion would amend the judgment by adding over \$173 million and Kodak's motion would reduce it by over \$47 million.

To repeat my earlier refrain, this case was lengthy and complex. Extensive factual findings were required and literally hundreds of mathematical calculations were performed, resulting in an opinion nearly 200 pages long. In any document of this size, minor clerical errors could be reasonably anticipated. Relief from such errors is provided by Rule 60 of the Federal Rules of Civil Procedure:

(a) *Clerical Mistakes*. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders....

Perhaps the Fifth Circuit Court of Appeals said it best:

Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another. Such a mistake may not be one of judgment or even misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature ... In such instances the judgment can be corrected to speak the truth.

*Dura-Wood Treating Co. v. Century Forest Indus.*, 694 F.2d 112, 114 (5th Cir. 1982) (citation omitted). After reviewing both parties' submissions, I find that clerical errors were made in the calculation of the award and, pursuant to Rule 60(a), hereby correct these errors by issuing corrected Appendices (designated I-IV in Roman numerals in order to avoid confusion with the October 12th Appendices). In making this finding, I reject several arguments raised by Polaroid as falling outside the scope of Rule 60(a). In addition, I reject both parties' Rule 59(e) motions and Polaroid's 52(b) motion.

Both parties have also pointed out typographical errors in the October 12th Opinion and my own review of the document unearthed others. Rather than simply issue an errata sheet and corrected pages to insert into the original Opinion, I believe that clarity will be better served by withdrawing the original Opinion and issuing a corrected version. While

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that is being prepared for issuance in the coming week, I have decided to issue the corrected Appendices and an errata sheet, keyed to the original Opinion, today. These documents will guide the reader to the clerical and typographical errors that have been corrected in the Opinion. I note for the record that my actions today in no manner alter any findings or the meaning of the original Opinion. The October 12th Opinion is substantively sound and remains unchanged.

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## **Background**

As detailed in the Introduction to my October 12th Opinion ("Opinion"), I was frequently required to chart a third course, rejecting both parties' methodologies and conclusions in order to determine, according to my understanding of the applicable law, how to fairly and adequately compensate Polaroid for Kodak's infringement. I strove to identify and accept those more credible portions of the various experts' testimony, to parse the numerous exhibits for the most reliable information and, finally, to construct an opinion that showed each analytical step along the path leading to the calculation of the final award. Cutting a path through the voluminous maze of testimony and exhibits required hundreds of factual findings and subsidiary findings. I endeavored to describe that path in detail and, by providing my own spreadsheets in the Appendices, hoped to make manifest any missteps or mistakes. Five such mistakes have been brought to the Court's attention for correction, and I address them *seriatim*.

### **1. Prejudgment Interest for 1977**

The parties agree that the prejudgment interest award for 1977 was inadvertently excluded from the calculation of the total award appearing in Appendix 4. A corrected Appendix IV, also incorporating the corrections listed below, is attached [omitted].

### **2. Treasury Bill Rate for 1979**

The parties agree that the average U.S. Treasury bill rate for 1979 was mistakenly miscalculated. The correct rate, 10.37%, appears in the corrected Appendix IV, attached [omitted].

### **3. Per Pack Film Revenue**

The parties agree that the average revenue figure for each Polaroid film pack appearing in Appendix 2 inadvertently lists domestic, rather than world-wide prices. I intended the film revenue figure to be based on world-wide prices, as is the camera revenue figure in Appendix 1. Correcting this clerical error results in an average per pack film revenue figure of \$5.82, rather than \$5.83, thus reducing the final award a corresponding amount. A corrected Appendix II is attached [omitted].

### **4. 1984 and 1985 Incremental Film Sales**

The parties agree that Appendix 2 lists incorrect incremental film sales totals for the years 1984 and 1985, although they do not agree on what these totals should be. The formula I used (see Opinion at p. 164-65) to determine incremental film sales for each year is as

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follows: I subtracted incremental camera sales from total camera sales, as listed in Appendix 1, for each year. I then multiplied this sum - for example, 1,557,770 for 1981 - by 15, the film pack "burn rate," and subtracted that sum from the total film sales figure listed in Appendix 2 (in 1981, this was 63,096,000, rounded off, minus 23,366,550). The resulting sum should reflect total lost film sales for that year, or the same figure as Total Film Sales (line 1) minus Incremental Film Sales (line 2) in Appendix 2. Continuing the example of 1981, the figure of 23,366,550 results from either calculation.

Through a clerical error, the incorrect Incremental Film Sales figures were listed in the years 1984 and 1985 in Appendix 2. Lost film sales should be 2,267,400 in 1984 and 1,080,405 in 1985, and the corrected totals in line 2 should be 30,518,600 and 25,248,595 respectively. Correcting this clerical error adds almost seven million film packs to the Incremental Film Sales total in the corrected Appendix II.

### **5. 1976 Camera Manufacturing Totals**

Appendix 1 lists an incorrect figure for the total number of additional cameras Polaroid could have manufactured in 1976. That figure should be 170,500, as stated in the Opinion at page 141. The corrected Appendix I, attached [omitted], uses the proper camera totals. Appendix III, attached [omitted], has also been corrected to reflect the corresponding increases in the 1976 camera and film totals for the reasonable royalty calculation. Correcting this clerical error increases the reasonable royalty award on camera sales.

Correcting the corresponding film totals in Appendix 2 is somewhat more complicated. I used two different methods for determining Incremental Film Sales in Appendix 2. For the years 1981 through 1985, I used the method described in the previous section. In the years 1977 through 1980, I made specific findings as to each year. Those findings are reported at page 132 of the Opinion. In 1976, I found that Polaroid could manufacture sufficient additional film packs to meet demand. Because significantly fewer cameras were available in 1976 than in later years, a modified calculation is required. In order to be consistent, the film burn rate of fifteen packs per camera should be applied. Instead

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of basing incremental film sales on the number of lost camera sales in 1976, however, the figure should be based on the number of Incremental Camera Sales for that year.

Applying the burn rate of fifteen film packs for each of the 170,500 cameras listed in the corrected Appendix I results in Incremental Film Sales of 2,557,500. *See* Appendix II. This figure is fair and rational and comports with the Opinion's findings concerning the appropriate burn rate to apply in determining lost film sales throughout the infringement period. *See* Opinion at p. 164. The corresponding corrections have been made in the lost profits and reasonable royalty calculations.

Again, to be clear. The Appendices attached to the October 12th Opinion, and the corrected Appendices issued today, are my own creation. No single exhibit or expert's testimony calculated the lost profits, a reasonable royalty, or the interest award precisely as required by the factual findings detailed in the Opinion. The Appendices were prepared in order to provide the parties with a detailed roadmap of the Court's analytical process and findings. Following that roadmap, the parties identified several clerical errors

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and properly brought them to the Court's attention for correction.

The clerical errors in the Appendices create "a state of confusion where judgments or orders are facially inconsistent with each other," *Knox v. Lichtenstein*, 654 F.2d 19, 21 (8th Cir. 1981), and it is this confusion that Rule 60(a) is intended to remedy. These five corrections are all of the type contemplated by Rule 60(a). Each resulted from such facially obvious clerical errors as mistakes in the calculation of totals or averages and using the incorrect numbers from an exhibit. These errors are "correctly characterized as 'ministerial' or 'clerical' or 'inadvertent'" and do not involve matters requiring an "exercise of judgment" or "deliberative error." *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 153 (1st Cir. 1980).

### ***Remaining Arguments***

"Deliberative error," or a mistake in deciding a point of law, is properly addressed through Rules 59(e) and 52(b). *Id.* at 153-54. As the First Circuit Court of Appeals recently explained, Rule 52(b), like Rule 59(e), is not intended to allow parties to rehash old arguments already considered and rejected by the trial court ... [I]ts purpose is to permit the correction of any manifest errors of law or fact that are discovered, upon reconsideration, by the trial court. Under the rule, the trial court is the first recourse for the correction of errors.

*National Metal Finishing Co. v. Barclays-American/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990) (citation omitted). Polaroid claims that the October 12th Opinion contains several "manifest errors of law or fact" that would be properly corrected under Rules 59(e) and 52(b). Specifically, Polaroid asks the Court to reconsider its calculation of film manufacturing costs (or "special costs"), including incremental in-place positive and negative sheet coating capacity, incremental battery capacity, and in-place incremental film assembly capacity. Polaroid further argues that the special costs have been miscalculated in Appendix 2.

Polaroid identifies no manifest error requiring a reconsideration of these various issues. Polaroid's arguments on special costs were presented at trial and were duly considered by the Court. We see no reason to revisit the issues now and believe the findings and conclusions reached in the Opinion are amply supported by the record. As to the question of how the costs were calculated, the Opinion is clear. On page 154, I found that "the incremental cost per film pack that Polaroid would have incurred is best *approximated* by Mr. Stringer's year-by-year cost estimates found at Tab 25 of DF 61,458A, plus 9.5%." (emphasis added). On page 153, I explained that "these costs total *approximately* fifty cents per camera." (emphasis added). Determining special or incremental costs required a complex, multi-faceted analysis of the countless elements comprising Polaroid's world-wide operations, from the availability of negative and positive sheet coating machines here and abroad to battery manufacturing capacity. By its very nature the calculation cannot be precise, and the Opinion makes that fact abundantly clear.

More troubling is Polaroid's desire to credit itself with perfect hindsight, based on the Court's findings. Because, for example, the incremental film sales I found for the years 1980 to 1985 fall within the incremental sheet coating capacity calculated by Mr. Cook, Polaroid argues that it would not have needed additional sheet coating equipment and therefore should not be charged for the machines it actually constructed. Arguments such

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as this directly contradict my central finding that Polaroid's forecasting and planning capabilities were far from perfect (see discussion beginning at p. 127 of the Opinion). Polaroid has pointed to no manifest error of fact requiring reconsideration of these various interrelated findings.

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Polaroid's final argument concerns the film burn rate for cameras sold in the premium channel. This argument was also duly considered and rejected in the October 12th Opinion. At page 164, I stated that "I have also considered evidence that some camera sales, such as the premium cameras, would not 'burn' as much. The difference is insignificant. On average, I believe that the number is fair." Polaroid clearly believes the number is not fair, but has pointed to no manifest error requiring reconsideration of this finding.

### ***Conclusion and Award***

[1] In conclusion, the correction of five clerical errors in the Opinion issued October 12th, taken together, reduces the final award by \$36,298,596. Total royalties awarded are \$204,467,854 and total lost profits awarded are \$233,055,432, for a total corrected award of \$437,523,286. The total interest award is \$435,635,685 and the corrected final judgment is \$873,158,971. An amended Opinion and Order of Judgment will issue. So ordered.

**- End of Case -**

