

Too Late to Antedate: A Sandbagging Strategy Struck

***Implicit, LLC v. Sonos, Inc.*, 2020-1173, 2026 WL 653502 (Fed. Cir. Mar. 9, 2026)**

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In *Implicit v. Sonos*, the Federal Circuit affirmed the PTAB’s refusal to let Implicit use post-decision certificates of correction to introduce a new antedating theory in *inter partes* review. Implicit owned two related patents that originally named two individuals as the sole inventors. After Sonos filed IPRs to challenge the patents, Implicit argued that those inventors had conceived the claimed subject matter before the invalidating reference put forward by Sonos, by working with an engineer. The Board found the evidence insufficient, treated the invalidating reference as prior art, and held the challenged claims unpatentable. After the Board’s final written decisions and a subsequent remand for unrelated reasons, Implicit asked the USPTO to correct inventorship of both patents to add the engineer, who had contributed to the invention of the invalidating reference, as an inventor. Once those certificates of correction issued, Implicit argued that the correction should retroactively change the priority analysis and allow it to rely on the corrected inventorship directly to antedate the invalidating reference. The Board rejected that attempt and concluded that the correction had no effect on the final written decisions. In this new ruling, the Federal Circuit agreed.



The Federal Circuit held that forfeiture can apply even where a correction of inventorship under 35 U.S.C. § 256 has retroactive effect, and it found no abuse of discretion in the Board’s conclusion that Implicit had forfeited its new theory by failing to raise it earlier. The court emphasized that Implicit had the relevant inventorship evidence from the start, waited until after the final written decisions to seek correction, and—unlike the patentee in cases Implicit cited to justify their actions—could not point to any intervening change in claim scope that altered the inventorship analysis.

The opinion also criticizes Implicit’s timing in seeking correction. When pressed at oral argument on why the additional inventor had not been added sooner, Implicit pointed to its belief that its original inventorship position was correct and that the additional inventor resided in Australia. However, the panel found those explanations inadequate. Instead, the court explained that such a late shift raised concerns about sandbagging—allowing a party to proceed on one theory before the Board and then pivot to another only after receiving an unfavorable result. The panel explained that Implicit had the relevant inventorship evidence in its own possession from the outset, intentionally litigated the IPRs on the theory that there were only two inventors, and waited until after the final written decisions to seek correction. As the court noted, diligence matters when a change in inventorship could directly affect the outcome of a pending proceeding.

In the end, the Federal Circuit held that the Board did not abuse its discretion in finding that Implicit forfeited antedating arguments based on corrected inventorship. The result is a pointed reminder that even if inventorship can be corrected later, a party may still lose the ability to use that correction to revive a priority argument that should have been raised earlier—and the Federal Circuit has a low tolerance for the appearance of sandbagging.