

The “Should We?”, “If We Should, When?”, and “When We Do, What Then?” of Markman Hearings in Patent Infringement Cases

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The “Markman Hearing” in a patent infringement case (otherwise known as a “claim construction hearing”) derives its name from the case of *Markman v. Westview Instruments*, 517 U.S. 370 (1996) in which the United States Supreme Court decreed that the meaning of patent claims and their constituent terms and phrases (“limitations”) is purely a question of law. *Id.*

A. An Introduction to Patent Claims and Markman Hearings

The meaning of elements (“limitations”) of patent claims is central to any question of patent infringement or validity. To understand this, one must possess at least rudimentary knowledge of how patent claims work.

A patent’s coverage is *not* defined by the written description of the invention, the drawings in the patent, the patent title, or the abstract, though such components may aid in interpreting a claim. Such coverage is rather a function solely of the patent claims. (“It is a ‘bedrock principle’ of patent law that ‘the claims of a patent define the invention to which the patentee is entitled the right to exclude.’” *Phillips v. AWH Corporation*, 415 F.3d 1303 (Fed. Cir. 2005) (*en banc*), citing *Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc.*, 381 F.3d 1111 (Fed. Cir. 2004)).

One looks to a patent’s claims to determine that which, without permission of the patentee, members of the public cannot legally do or make without infringing the patent during its term. On the other hand, if one wishes to measure the validity of patent protection, one examines the claims, in most cases, to determine if the wording of the claims expands the scope of the patent’s coverage beyond that which is allowed by law.

If someone wants to know whether or not their product infringes a certain patent, they look to the CLAIMS. If someone wants to invalidate a patent, they look to the CLAIMS to determine whether the claim “covers” more than is legally permissible.

Very generally, a patent claim works as either a “checklist for infringement” or a “checklist for invalidity.” Each and every element of a patent claim must be present (“checked off”) in a product or process, if that product or process is to be “covered” by the patent. On the other hand, each of these checklist items must also be found in any product or process that is alleged to sufficiently predate the related act of invention and/or patent application filing date to invalidate the claim.

Suppose a patent claim in a patent for a hypothetical machine (“widget”) reads:

1. A widget comprising:
 - A,
 - B,
 - C, and
 - D.

For purposes of our example, each of “A”, “B”, “C”, and “D” represents a machine component, whereas in process or chemical composition patents, they might represent, respectively, process steps or chemical constituents. In a patent claim for a machine, “A” in this example might read “an electric motor”, and “B” might read “a gearbox, interfaced with said electric motor”, and so on. The word “comprising” means “including, but not limited to.”

The unauthorized making, selling, using, importing, etc. of anything that *includes* A, B, C and D (all listed elements are “checked off”) will infringe the claim. So if, without permission of the patent owner, one makes a widget that incorporates **A**, **E**, **B**, **R**, **C**, **Z**, **T**, and **D**, there is infringement of our widget patent claim, because the widget *includes* A, B, C, and D. It is of no consequence that E, R, Z, and T are also present. One does not avoid infringement of a valid claim by adding elements or characteristics, only by eliminating one or more listed elements, such that the “checklist” is not fully satisfied. *Stiftung v. Renishaw PLC*, 945 F.2d 1173, 1178 (Fed. Cir. 1991).

To invalidate a patent claim on the simplest basis of finding a single item in the prior art that sufficiently predates the related act of invention and/or patent application filing date, one must, in like fashion, “check off” each and every element of the patent claim by finding them in the prior art item. *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1282 (Fed. Cir. 2000).

The difficulty in applying these “checklists” in either context (infringement or validity) lies in the fact that the terms of each checklist item may not be in language that is easily understood. Yet, anyone involved in patent infringement or validity analysis must understand the meaning of each “checklist item.” The patentee must know what its patent covers to assess suspected infringement, and members of the public (particularly any such members who are accused of patent infringement) must know that which they cannot do without permission of the patentee. Furthermore, judges and juries must know when patent claim elements are “checked off” when presented with issues of infringement and/or validity.

A Markman Hearing involves, in various forms, presentations on behalf the patentee and the accused infringer(s) concerning the parties’ respective positions on proper construction of patent claim terms. The result of a Markman Hearing is an order of court that defines claim terms for the ultimate fact finder who will then apply the terms to the evidence of alleged infringement and/or invalidity.

The words of a claim are generally given the ordinary and customary meaning that they would have to a person of ordinary skill in the art at the time of the invention (i.e., as of the effective filing date of the patent application). *Phillips* 415 F.3d at 1313. A Markman Hearing involves determining such claim term's meaning (or any alternative meaning that, for example, arises from a clear, but differing meaning provided by the patentee in the patent or associated documents).

A Markman Hearing is, for many patent infringement cases, the single, most significant event of the case. Once the meanings of patent claim terms are known, the universe of likely infringing articles or activities on the one hand, and the universe of potentially invalidating prior art on the other hand, is more easily ascertained. Therefore, if conducted sufficiently early in the case, the court's order flowing from a Markman Hearing will help focus discovery and motion practice for greater efficiency and effectiveness. Also, once the relative merits of the parties' claims and defenses come more into focus through knowledge of the claim term definitions, settlement of the dispute tends to be more likely.

B. Whether or Not to Seek a Markman Hearing.

Despite their paramount importance in many cases, a "successful Markman Hearing" may lie in not having one. Nothing in the law *mandates* the use of a Markman Hearing in every patent case. Courts retain the discretion to construe the claims on the basis of a paper record alone. In a case in which the technology is readily understood by the court, and the claims are relatively straightforward, a Markman hearing may be unnecessary. *LRC Electronics, Inc. v. John Mezzalingua Assocs., Inc.*, 974 F. Supp. 171 (N.D.N.Y. 1997). This is because the Markman Hearing is largely an avenue for the Court to consider extrinsic evidence such as expert opinions, treatises, technical references, dictionary definitions, and the like. Claim terms that are not highly technical or scientific in nature will often not require extrinsic evidence to ascertain their meaning. Rather, the intrinsic evidence – the claims, the specification, and the prosecution history – will often render the claim limitations' meaning adequately clear, either for the Court to draft jury instructions without input from the parties, or simply direct the jury to apply each term's plain and ordinary meaning in determining infringement of an accused device or activity. *Digital Biometrics, Inc. v. Indentix Inc.*, 149 F.3d 1335, 47 USPQ2d 1418, (Fed. Cir. 1998).

For reasons of cost alone, easily understood claim limitations may urge against either patentee or accused infringer seeking a Markman Hearing.

An additional consideration for many patentee plaintiffs is that the patentee is often best served by a jury's instruction to apply a patent term's ordinary meaning, rather than a more precisely crafted definition as often flows from a Markman Hearing. Considerations for Defendants are, of course, the converse.

C. When to Strongly Advocate for a Markman Hearing

If the meaning of a claim term is justifiably in dispute, it is likely in the interest of all parties to seek claim construction of that term, *at least* before trial. Failure to do so introduces the likelihood of wasted discovery and trial preparation based, at least in part, on merely hypothetical claim constructions derived by the parties themselves. Lay and expert witnesses are also more likely to testify or proffer opinions during discovery, or even at trial, that may later cost them credibility when such testimony proves to be inconsistent with positions later taken to account for a later claim construction.

Though many courts have local rules or practices that limit the number of claim terms that will be construed, such rules or practices will not trump the duty of courts to construe terms when either: 1) the terms have more than one ordinary meaning; or 2) failure to define the terms does not settle the parties' dispute. *O2 Micro v. Beyond Innovation, et. al.*, 521 F.3d 1351 (Fed. Cir. 2008). Therefore, it is incumbent on parties to seek, through motion practice, if necessary, construction of so many claim terms as truly require construction, regardless of countervailing limits on claim construction.

D. Timing Considerations for Markman Hearings

The Federal Circuit does not prescribe any particular timing or processes for the claim construction process. The Federal Circuit's directive is that trial courts "exercise [their] discretion to interpret the claims at a time when the parties have presented a full picture of the claimed invention and prior art." *Sofamor Danek Group, Inc. v. DePuy-Motech, Inc.*, 74 F.3d 1216, 1221 (Fed. Cir. 1996). In its *Markman* opinion, the Federal Circuit instructed that the trial court could even wait until it framed the jury charge before construing the claims. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 981 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996).

While, as mentioned, patentees are often best served by having no Markman Hearing at all, if there is to be such a hearing, patentees will tend to prefer having the claim construction hearing late in the case, near the end of, or after the close of discovery. Such timing of claim construction will deny Defendants the chance to tailor their defenses to account for specific definitions that the fact finder will eventually apply (and/or that will be applied when considering summary judgment motions). Further related to summary judgment motion practice is the fact that a successful defense motion based on alleged non-infringement and/or invalidity is unlikely, absent a claim construction that can be applied to an alleged infringement product or activity and/or through which alleged invalidating prior art can be interpreted.

The converse of the above is, of course, true for accused infringers. Patent infringement defendants will want early claim construction as it provides a veritable map for searching for and interpreting prior art that may invalidate claims. Furthermore, early claim construction will aid in having a defense infringement or validity expert opine in early discovery in such a manner that the stated reasons for non-infringement or invalidity will not later prove to be inconsistent with positions

that must be taken at trial, or in jury argument, in the event of a later claim construction.

Any party, plaintiff or defendant, who is interested in settling the case as soon as possible, is likely best served by concluding claim construction as early in the case as possible.

E. Choosing and Focusing Points for Claim Construction Arguments.

Once claim terms to be construed are known, it becomes necessary for patentees and accused infringers alike to focus on all consequences of claim breadth, as affected by claim construction. This author has observed parties on both sides of dockets espouse particular claim constructions, seemingly with complete disregard for a construction's dual effect in contexts of infringement *and* validity.

A patentee will occasionally focus almost entirely on infringement, and thereby argue for the broadest possible scope, all the while overlooking the fact that a broader construction may lead to the claim "reading on" invalidating prior art. Conversely, an accused infringer may develop similar "tunnel vision" and argue such a narrow construction as to deprive themselves of an otherwise compelling invalidity defense (*see Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 911 (Fed. Cir. 2004) and *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1384 (Fed. Cir. 2001)).

Perhaps in this context it bears repeating the old adage: "That which infringes if later, anticipates if earlier." *Peters v. Active Mfg.*, 21 F. 319 (W.D.Ohio 1884) (affirmed and quoted in 129 U.S. 530 (1889)). This statement points to the dual reality that a broadly construed claim element may allow one to make out a case of infringement by an accused device, but at the same time may, by casting a broader net, allow the encompassing claim to read on a prior art device, writing or event as part of establishing invalidity. Therefore, parties must be mindful of the content of prior art, as well as the details of the accused device, before committing themselves to a proposed claim construction that they might later regret.

E. Limit Claim Construction Arguments and Foundations Thereof to Relevant Evidence

1. A Person of Ordinary Skill in the Art

In addressing claim construction, a court must ascertain how a person of ordinary skill in the art would have understood the disputed claim terms at the time of the invention. *Markman*, 52 F.3d at 986. Accordingly, patent claims must be construed not through the eyes of the court, nor those of any proffered experts, but rather from the standpoint of a person skilled in the art. *Interactive Gift Express, Inc. v. CompuServe Inc.*, 256 F.3d 1323, 1332 (Fed.Cir.2001). In constructing the hypothetical of a person of ordinary skill in the art, a court should consider the educational level of the inventor, the type of problems encountered in the art, the prior art solutions to the problems, the rapidity with which innovations are made in

the field involved, the sophistication of the technology, and the educational level of workers in the field. *Helifix Ltd. v. Blok- Lock, Ltd.*, 208 F.3d 1339, 1347 (Fed.Cir.2000) (citation omitted).

With this guidance, litigants must, when arguing claim construction, support and tailor their arguments always to answer the question: “What are the characteristics of the ‘person of ordinary skill in the art’, and what would that person have understood the claim term in dispute to mean at the time of the invention?”

2. Time-Sensitive Evidence

“A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” – Justice Oliver Wendell Holmes. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

When arguing claim construction, it is imperative that courts and parties alike bear in mind the boundaries between relevant and irrelevant evidence and arguments as they relate to the relevant history of the subject invention and patent. As already explained, the question in any claim construction context has not only to do with what a term means (“meant”, actually), but with which meaning, at which time in history is the proper measure of a patent term’s meaning and breadth.

For purposes of infringement, the Federal Circuit construes claims “as of the date of the invention.” *Markman I*, 52 F.3d at 986; *Phillips*, 415 F.3d at 1312. The same mark in time applies to validity determinations when comparing claim scope (according to the claim terms’ meanings) against prior art in determining novelty and obviousness. Mark A. Lemley, *The Changing Meaning of Patent Terms*, 104 Mich. L. Rev. 101 (2005). For present purposes, it will simply be noted that, for doctrine of equivalents, and coverage by means plus function claims (35 U.S.C. §112(6)), different points in time are employed.

The milestone of “as of the date of the invention” imposes on parties and courts involved in claim construction the duty to consider only information bearing on the meaning of terms at that time in history. Experts having no knowledge of the pertinent art “as of the date of the invention”, dictionaries published long past the date of invention, and later-in-time patents and publications sought to be used to explain patent claim term meanings are all things observed by this author to be proffered by parties to patent litigation in claim construction, but are also examples of wholly improper references for use in the context of claim construction.

F. Prioritize Relevant Evidence.

A hierarchy exists with respect to potentially relevant evidence of the proper meaning of patent claim terms. This hierarchy has ebbed and flowed over time, but is now seemingly entrenched after *Phillips*. Selecting and arguing one’s evidence with the teachings of *Phillips* in mind will more likely produce the best results for a

litigant at the trial level (including that of preserving credibility with the court), and will reduce the chances of reversible error brought about by parties' urging of, and the trial court's possible erroneous reliance upon, a flawed evidentiary foundation for claim construction.

According to *Phillips*, and as mentioned previously, the words of a claim are generally given the ordinary and customary meaning that they would have to a person of ordinary skill in the art at the time of the invention (i.e., as of the effective filing date of the patent application). *Phillips*, 415 F.3d at 1316. In some cases, this ordinary and customary meaning is readily apparent, and claim construction involves little more than applying the widely accepted meaning of commonly understood words. *Id.* In these circumstances, dictionaries may be helpful. *Id.* at 1314. However, the ordinary and customary meaning of the claim term may not be so self-evident in other cases, and other sources must be examined.

In terms of relative weight of evidence in construing a term, the meaning of which is not effectively self-evident, *Phillips* provides guidelines that make it useful to think of starting closest to the claim term in defining its meaning, and, as needed to determine that meaning, moving "outward" toward ever more distant forms of evidence.

After considering the term itself for any commonly accepted meaning, and perhaps finding none, one next looks to the context in which the claim term is used. Often, the remainder of the claim itself, or at least other claims in the same patent will sufficiently bring light to the term's proper meaning. Likewise, differences among claims often provide a useful guide in understanding the meaning of a particular claim term. *Id.* at 1314. For example, the presence of a dependant claim containing a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim. *Id.* at 1315.

Moving further "outward", one next looks to the patent's remaining specification (the textual description of the invention and the embodiment(s), as well as any drawings). *Id.* at 1314. It is because of the requirement that an inventor provide in the patent's specification a description of the subject invention in "full, clear, concise, and exact terms" that such is a preferred source of guidance in construing a claim. *Phillips*, 415 F.3d at 1316. Furthermore, claims must be construed so as to be consistent with the specification of which they are a part. *Id.* For example, the specification will occasionally include a special definition given to a claim term by the inventor that is at odds with "ordinary and customary meaning." In such cases, the inventor's definition will prevail. *Id.* Furthermore, the specification may reveal that an inventor intended that the claimed invention is limited to a greater degree than the "plain and ordinary meaning" of the claim terms would otherwise indicate. Again, in such cases, this teaching by the specification will prevail in defining the affected claim terms. *Id.*

Moving again further "outward", *Phillips* teaches that a court should also consider the patent's prosecution history. *Id.* at 1317. The prosecution history (the

file of interchanges between the inventor(s) and the Patent Office) will reveal whether the inventor limited the invention during prosecution, for example, to avoid specific prior art, and thereby narrowed the claim scope. *Id.* Except in the context of disclaimer (“prosecution history estoppel”), prosecution history is of less relative weight in claim construction than earlier-mentioned sources, because, as the *Phillips* court explained, the prosecution history reflects an on-going negotiation, rather than its ultimate product. The specification of the issued patent (the end product) is, therefore, a more reliable source of evidence of proper claim term meaning. *Phillips*, 415 F.3d at 1317.

To this point, “intrinsic” evidence will have been considered. If analysis of the available intrinsic evidence resolves a perceived ambiguity in a disputed claim term, the inquiry ends there. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed.Cir.1996). When, on the other hand, there remains uncertainty regarding a claim after consideration of all intrinsic evidence, the court should turn to examination of such available extrinsic sources (“extrinsic evidence” that is farther “outward” still from the claim terms themselves) as expert testimony, inventor testimony, dictionaries, and technical treatises and articles, for guidance in reconciling any conflicting intrinsic indicators. *Id.* at 1584. It should be noted, however, that extrinsic evidence may only be used to aid the court in understanding patent claims, and cannot be relied upon to justify any departure from or contradiction with the actual claim language employed by the applicant. *Id.* To assist in resolving an ambiguity, in its discretion, a court may admit and rely on prior art, whether or not cited in the specification or file history. *Id.* at 1584-85. Prior art and dictionaries, as publicly accessible, objective information, are for obvious reasons preferable to expert testimony as tools for resolving ambiguity. *Id.* at 1585; see also *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1202-03 (Fed.Cir.2002).

It is said that undue reliance on extrinsic evidence poses the risk that it will be used to change the meaning of claims in derogation of the “‘indisputable public records consisting of the claims, the specification and the prosecution history,’ thereby undermining the public notice function of patents.” *Phillips* at 1319.

In diverging from earlier Federal Circuit jurisprudence in which dictionaries had been placed high in the pecking order of evidence for claim construction (*see Texas Digital Sys., Inc., supra*, the *Phillips* court instructs that “[a] claim should not rise or fall based upon the preferences of a particular dictionary editor, or the court’s independent decision, uninformed by the specification, to rely on one dictionary rather than another.” *Phillips*, at 1322. The proper methodology, therefore, permits judges to rely on dictionaries “to better understand the underlying technology” and to “construe claim terms” so long as “the dictionary definition does not contradict any definition found in or ascertained by a reading of the patent documents.

A special note concerning inventor testimony: One arguable exception to this evidentiary hierarchy “from inward to outward” relates to inventor testimony. One

might consider the inventor's intent to be highly relevant to the meaning of claim terms, and therefore falling at least "close" to the "intrinsic" grouping of evidence. Such is not the case. It is appropriate to consider inventor testimony "to provide background information, including explanation of the problems that existed at the time the invention was made and the inventor's solution to these problems." *Voice Techs. Group, Inc. v. VMC Sys., Inc.*, 164 F.3d 605, 615 (Fed. Cir. 1999). However, the subjective intent of the inventor has "no probative weight" in determining the scope of a claim. Inventor testimony may be used to explain the invention, but it may not be used to vary or contradict the scope of the claims. *Id.*

G. A Miscellany of Markman Considerations

When casting arguments in the Markman Hearing context, it may be useful to consider a variety of "canons of claim construction" that (depending on one's docket position, and though many are contradictory of others and are of questionable remaining validity) may be helpful in making one's case. One should, of course, in every instance, verify the remaining validity, if any, of each such canon as this area of law continues to ebb and flow.

The respective benefit or detriment of the following premises will be apparent to anyone of sufficient experience to be conducting patent litigation:

- (1) When the claim addresses only some of the features disclosed in the specification, it is improper to limit the claim to other, unclaimed features. *Golight, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1331 (Fed. Cir. 2004);
- (2) A claim should, if possible, be interpreted to maintain its validity. *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1384 (Fed. Cir. 2001), but see *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 911 (Fed. Cir. 2004));
- (3) No two claims in the same patent should be interpreted to have the same scope. Mark A. Lemly, *The Limits of Claim Differentiation*, 22 Berkeley Tech L.J. 1389, (2007) (discussing the canon of claim differentiation and its limits);
- (4) In the event of two plausible claim constructions, the narrower is preferred. *Multiform Dessicants, Inc. v. Medzam Ltd.* 133 F.3d 1473, 45 U.S.P.Q.2d 1429 (Fed. Cir. 1998);
- (5) "[O]ne may not read a limitation into a claim from the written description", but "one may look to the written description to define a term already in a claim limitation, for a claim must be read in view of the specification which it is a part." *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1248 (Fed. Cir. 1998);

- (6) “[C]laims are not interpreted in a vacuum, but are part of . . . the specification.” *Scimed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1341 (Fed. Cir. 2001);
- (7) A patentee disclaims or disavows subject matter by distinguishing the claimed invention from the prior art; claim terms are not weasel words to be twisted, like a “nose of wax,” to mean one thing during patent prosecution and something else during litigation. *Ecolab, Inc. v. Envirochem, Inc.*, 264 F.3d 1358, 1368 (Fed. Cir. 2001);
- (8) Remarks in the prosecution history can narrow the meaning of a claim term only if they are unequivocal and evidence a clear and unmistakable surrender of subject matter. *Superguide Corp. v. DirectTV Enters.*, 358 F.3d 870, 881 (Fed. Cir. 2004);
- (9) The Court will not construe claims to cover subject matter broader than what the patentee described in its specification, regarded as comprising its invention. *Ventana Medical Sys. v. BioGenex*, 473 F.3d 1173 (2006);
- (10) As a general rule, the Court has a strong preference not to exclude a preferred embodiment from a claim construction. *Primos v. Hunter’s Specialties*, 451 F.3d 841, 849 (2006); *Verizon v. Vonage* (Sept. 26, 2007);
- (11) A claim may be construed to exclude the preferred embodiment where the language of the claim is clear, as courts will not rewrite a claim to say what the inventor really meant to say, even when the error and the correct meaning are evident. *Chef America v. Lamb-Weston*, 358 F.3d 1371 (Fed. Cir. 2004); see also *Helmsderfer v. Bobrick*, 527 F.3d 1379 (2008);
- (12) A claim need not cover all embodiments, as a patentee may draft different claims to cover different embodiments. *Helmsderfer, supra*;
- (13) Using “means” creates a presumption that the claim is drafted in a means-plus function format, but this presumption does not apply when the claim recites sufficient structure, material or acts to perform the claimed function. *Callicrate v. Wadsworth Mfg., Inc.*, 427 F.3d 1361, 1368 (Fed. Cir. 2005);
- (14) In construing a means plus function claim element, the court must first identify the recited function, and, second, the court must identify the corresponding structure disclosed in the specification that performs that function. *Med. Instrumentation*

and Diagnostic Corp. v. Elekta AB, 344 F.3d 1205, 1210 (Fed. Cir. 2003);

- (15) The “corresponding structure” to be identified when construing a means plus function claim element is not to be found in the mere listing of prior art, but rather in structures actually, expressly set forth in the specification. *Pressure Products Medical Supplies, Inc. v. Greatbatch Ltd.* 599 F.3d 1308 (Fed. Cir. 2010).

H. Conclusion.

Patent litigation is complex and daunting. Claim construction is the most complex and challenging of all stages of most patent cases. Despite recent guidance from the courts, there remain ambiguities and unanswered questions concerning the appropriate subject, timing, and methodologies involved in “simply” informing patentees, accused infringers, and the public at-large of that which a patent covers.

Patent claim construction, therefore, requires of all involved a thorough understanding of the policies behind patents and claim construction principles, the technology at issue, the prior art, and the proceedings at the Patent Office while obtaining a patent at issue. With all of that in hand, still required of patent litigants is strong advocacy, because the ultimate decisions on patent claim construction are still made by people, based upon, or at least influenced by, the selected argument points and the skill with which they are presented.