

Is Something Amiss?

A Commentary on the Aftermath of *Phillips v. AWH Corp.*

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Two divergent lines of cases emerged in the Federal Circuit in the wake of *Markman v. Westview Instruments*¹ on the proper methodology to use for defining disputed terms of patent claims. Many of these opinions purported to be consistent with Federal Circuit precedent, yet obvious inconsistencies appeared, causing much uncertainty for patent litigators and prosecutors. The dispute focused on whether a trial court should primarily consider intrinsic evidence – the claims, the specification, and the prosecution history – or extrinsic evidence – mainly general use and technical dictionaries and treatises – to properly construe terms found in patent claims.

On July 21, 2004, the Federal Circuit granted rehearing *en banc* in *Phillips v. AWH Corp.*² in part to resolve this claim construction conflict. Ultimately, the court issued a new opinion on July 12, 2005, that held that intrinsic evidence must be the

* Several very experienced members of the firm provided me with some advice and guidance from the perspectives of the patent prosecutor and patent litigator. Many thanks to them for their help.

primary source for construing patent claims. The court further reasoned that while extrinsic evidence may be consulted to assist the court in understanding a particular technology, it must be afforded its appropriate weight – subordinate to all of the intrinsic evidence. Although the Federal Circuit in *Phillips* provided practitioners guidance on which to base future claim construction attempts, it admittedly constructed a loose framework designed to be applied on a case-by case basis.

After *Phillips*, claim construction jurisprudence remains in disarray as the Federal Circuit appears to be applying different parts of its *Phillips* ruling in different cases. The effects of the holding in this case will not be totally clear for some time, as evidenced by the convoluted holdings being handed down post-*Phillips*. To be successful under the current case law, patent litigators must master a comprehensive understanding of *Phillips* and keep abreast of pending decisions applying *Phillips*. Furthermore, patent prosecutors must write precise specifications, focusing on the consistent use of terms between the claims and the remainder of the specification. Although the court may have disappointed many observers when it refused to provide clear guidelines for claim construction in *Phillips*, the case's legacy will be defined more by what it failed to say rather than by its

explicit holdings. The days of the dictionary presumption are over, but where claim construction goes from there remains unclear.

I. Phillips I – A Bird that Didn’t Fly

In its order granting rehearing *en banc* in the initial *Phillips* case, the Federal Circuit vacated its previous judgment entered April 8, 2004³ and withdrew the opinion of the first panel that affirmed the grant of summary judgment after a claim construction hearing.⁴ In the Federal Circuit’s order, the majority invited the parties to file additional briefing and any other interested parties to file *amicus curiae* briefs on seven questions.⁵ Many of the court’s questions focused on the proper weight to assign to different types of evidence used in claim construction.⁶

In the *en banc Phillips* case, the majority held that intrinsic evidence consisting of the claims themselves, the specification, and the prosecution history must be given greatest weight in claim construction.⁷ Further, the majority stated that dictionaries and other extrinsic evidence may be consulted to assist the court in understanding a particular technology.⁸ The court settled upon loosely structured claim construction rules, focusing

mainly upon affording each type of evidence its appropriate weight.⁹ The majority expressly reaffirmed its decision in *Vitronics Corp. v. Conceptoronic, Inc.*¹⁰, which held that intrinsic evidence is to be consulted first to construe the claims and that extrinsic evidence is to be used only if the intrinsic evidence fails to provide an adequate definition of a claim term or merely to assist the court in understanding the technology in question.¹¹

The *en banc* court openly criticized the claim construction methodology presented in *Texas Digital Sys., Inc. v. Telegenix, Inc.*¹² The court explained that “the methodology [*Texas Digital*] adopted placed too much reliance on extrinsic sources such as dictionaries...and too little on intrinsic sources.”¹³ The court acknowledged that looking to intrinsic evidence first may lead a court to mistakenly read limitations from the specification into the claims, but expressed confidence in the district courts to properly perform that task.¹⁴

The facts of *Phillips* allowed the issue of the proper methodology to use for claim construction to be squarely presented. Edward H. Phillips invented vandalism-resistant panels that may be welded together to form walls capable of fire and noise insulation.¹⁵

After obtaining a patent on the invention, Mr. Phillips disclosed his invention to AWH Corporation, Hopeman Brothers, Inc. and Lofton Corporation (collectively hereinafter “AWH”) and agreed to allow AWH to make and sell the products.¹⁶ This agreement ended in 1990.¹⁷ In 1991, Mr. Phillips came across AWH advertising indicating that AWH continued to make and sell his invention without his consent.¹⁸ After failed negotiations, Mr. Phillips filed suit against AWH in 1997 alleging in pertinent part that AWH infringed his patent.¹⁹ After determining that the claims at issue contained “means-plus-function” language, the trial court considered the disclosures in the specification that corresponded to the “structure, material, or acts” as required under 35 U.S.C. § 112, ¶ 6.²⁰ The trial court concluded that the specification failed to disclose baffles found within the wall that were placed at a 90° angle.²¹ Moreover, the specification referred to baffles placed at any angle other than 90°.²² Upon ruling that the scope of the claims at issue failed to include baffles placed at a 90° angle, the trial court granted AWH’s motion for summary judgment.²³

II. Claim Construction Before *Phillips* – Clear as Mud

Before *Phillips* was redecided in July of 2005, two distinct claim construction methodologies had evolved²⁴: the so-called “dictionary disciples”²⁵ and those abiding by the “specification über alles” rule.²⁶ The “dictionary disciples” support defining claim terms primarily by referencing a dictionary, as long as the dictionary definition is not inconsistent with the specification.²⁷ In contrast, those advocating the “specification über alles” rule maintain that the trial court must first consult the intrinsic evidence of a patent. Only upon failure to find a definition from the intrinsic evidence, may the court consider extrinsic evidence to help define a claim term.²⁸ Many Federal Circuit cases construed claims by one methodology or the other. And while such opinions expressly acknowledged the conflict between the two, they failed to definitively resolve the conflict, thereby leaving the door open for a different panel to further tweak the already-murky rule.

For example, in *Renishaw PLC v. Marposs Societa' per Azioni*²⁹, the Federal Circuit recognized two classic claim construction canons, “(a) one may not read a limitation into a claim from the written description, but (b) one may look to the written description to define a term already in a claim limitation.” The *Renishaw* court heralded

these canons as being “at the core of claim construction methodology...provid[ing] guideposts for a spectrum of claim construction problems.”³⁰ The court quoted with approval from a 1958 CCPA case that “indiscriminate reliance on definitions found in dictionaries can often produce absurd results,” and further stated that “where there are several common meanings for a claim term, the patent disclosure serves to point away from the improper meanings and toward the proper meaning.”³¹ Similarly, in *Astrazeneca AB v. Mutual Pharmaceutical Co., Inc.*³², the Federal Circuit held that “extrinsic evidence...is useful insofar as it ‘can shed useful light on the relevant art – and thus better allow a court to place itself in the shoes of a person of ordinary skill in the art’ reading the claims alongside the rest of the specification.”³³ The *Astrazeneca* court acknowledged that some of the Federal Circuit’s recent cases “suggest[ed] that the intrinsic record...should be consulted *only after* the ordinary and customary meaning of claim terms...is determined” and cited a “presumption in favor of a dictionary definition.”³⁴ (emphasis added).

Other cases leaned more directly toward one methodology over the other. In

*V-Formation, Inc. v. Benetton Group SPA*³⁵, the Federal Circuit held that the “intrinsic record...is [the] primary tool to supply context for interpretation of disputed claim terms...to one of ordinary skill in the art at the time of the invention.” On the other hand, in *Superguide Corp. v. DirecTV Enter., Inc.*³⁶, the court held that “dictionaries are often helpful in ascertaining the plain and ordinary meaning of claim language.”

In 2002, the Federal Circuit decided *Texas Digital*, which attracted much attention and established itself as the seminal case for the “dictionary disciples.”³⁷ The court stated that the terms of a claim “bear a ‘heavy presumption’” that the definition intended in the claim is consistent with the ordinary meaning to a skilled person in the art and the trial court should give a claim term such a meaning unless the presumption is properly rebutted, regardless of whether the dictionary definitions have been offered into evidence.³⁸ The court acknowledged that dictionaries may be one of “the most meaningful sources of information to aid judges in better understanding...the technology.”³⁹ The court further reasoned that the intrinsic evidence relating to the patent should be examined, but only to determine whether it rebuts the presumption in favor of the dictionary meaning.⁴⁰ The court concluded that a dictionary definition may only be

rebutted where intrinsic evidence clearly uses words that are inconsistent with the ordinary meaning of the claim term found by consulting a dictionary.⁴¹

Roughly two years after *Texas Digital*, the Federal Circuit again changed its spots when it decided *C.R. Bard, Inc. v. U.S. Surgical Corp.*⁴², which held that “extrinsic evidence cannot alter any claim meaning discernible from intrinsic evidence.” The court credited a long line of precedent indicating that “the intrinsic record is the primary source for determining claim meaning.”⁴³ In criticizing the plaintiff’s argument that *Texas Digital* “held” that dictionaries should primarily be consulted when construing claim terms, the court stated that the *Texas Digital* court merely “advised” that such a method would be preferred.⁴⁴ However, this court also failed to clearly state the basis upon which *C.R. Bard* was decided and can possibly be considered dicta itself. Rather interestingly, the *C.R. Bard* court noted that the claim construction issue might soon be resolved by the grant of an *en banc* rehearing in the *Phillips* case.⁴⁵

Many practitioners conclude that the lack of consistency from the Federal Circuit on claim construction methodology pre-*Phillips* was a function of the ever-changing panels of judges assigned to a particular case.⁴⁶ As a result of the obvious disagreement

over the proper method to interpret claim terms by members of the Federal Circuit, many observers anxiously awaited claim construction guidance from *Phillips* that might yield some certainty.⁴⁷ Some even heralded *Phillips* as the most important patent case of the decade.⁴⁸

III. Has the Federal Circuit Merely Rearranged the Furniture?

The consequences of *Phillips* were anticipated to be grand, yet they failed to meet the expectations of those who hoped for a monumental change in claim construction jurisprudence.⁴⁹ Rather, *Phillips* signified a departure from the “experiment”⁵⁰ the Federal Circuit was conducting that was marked by its decision in *Texas Digital*.⁵¹ Since *Phillips*, the Federal Circuit has revisited claim construction issues several times, resulting in varying outcomes. In *Nystrom v. Trex Co., Inc.*⁵², decided only two months after the *Phillips* decision, the Federal Circuit granted rehearing for “the limited purpose of addressing the effects of *Phillips*.” Only two days after *Nystrom*, the Federal Circuit again tested its holding in *Phillips* in *Free Motion Fitness, Inc. v. Cybex Intern., Inc.*⁵³ This time the court incorporated a dictionary definition into the claim construction

analysis while claiming to follow the *Phillips* rule merely by stating that the specification comported with the dictionary's definition of the disputed claim term. Ultimately, claim construction methodology remains uncertain and unresolved post-*Phillips*.

A. Is *Phillips* Making a Name for Itself?

The Federal Circuit granted rehearing in *Nystrom* as a result of its holding in *Phillips*.⁵⁴ The court withdrew its pre-*Phillips* opinion in *Nystrom* and affirmed the district court's grant of summary judgment of non-infringement.⁵⁵ In its withdrawn 2004 opinion, the *Nystrom* court claimed that the district court "erroneously construed certain claim limitations" when it defined the terms at issue by following the *Texas Digital* methodology.⁵⁶ The court reasoned that in the absence of a clear definition or disavowal of a meaning in the disclosure, a term must be interpreted from the perspective of a person having ordinary skill in the art at the time of the filing of the application.⁵⁷ The perspective of the ordinary skilled artisan may be found by "reviewing a variety of sources, including the claims themselves; *dictionaries* and treatises; and the written description, drawings, and prosecution history."⁵⁸ (emphasis added). These statements

imply that dictionaries are higher in priority than the specification for purposes of claim construction.⁵⁹

Upon reconsideration of *Nystrom* post-*Phillips*, the Federal Circuit reversed its claim construction ruling, holding that a claim term must be interpreted in “light of the entire intrinsic record.”⁶⁰ The court further noted that the “construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.”⁶¹ However, the court also noted that “resort to dictionaries may be helpful.”⁶² The court stated that “[w]hat *Phillips* now counsels is that in the absence of something in the written description or the prosecution history...that the inventor intended a disputed term to cover more than the ordinary and customary meaning revealed...[in] the intrinsic records, it is improper to read the term to encompass a broader definition simply because it may be found in a dictionary, treatise, or other extrinsic source.”⁶³ In lieu of further explanation of *Phillips*, the court in *Nystrom* merely applied the principles already established in *Phillips* and reiterated its policies.⁶⁴

After *Nystrom* appeared to reaffirm *Phillips*, the Federal Circuit decided *Free Motion Fitness* in which the court construed the definition of the word “adjacent” by relying heavily on a dictionary definition. The court began by announcing its adherence to the claim construction methodology presented in *Phillips*, yet concluded without explanation that the term “adjacent” was not defined in the intrinsic evidence or the relevant art and so resorted to a dictionary.⁶⁵ The court focused its *Phillips*-based analysis on the freedom to incorporate dictionary definitions into claim construction and even pointed out that a court may afford a term the full breadth of its ordinary meaning, while presumptively receiving “its broadest dictionary definition or the aggregate of multiple dictionary definitions.”⁶⁶ The court settled on the meaning of “adjacent” to be “not distant.”⁶⁷ In reaching this construction, the court merely referred to the specification to make sure the dictionary definition did not contradict the one found in the specification.⁶⁸ While the *Free Motion Fitness* court mentioned the *Phillips* methodology, it did not actually apply that methodology.⁶⁹

Since *Phillips*, the Federal Circuit appears to have selected portions of the *Phillips* claim construction methodology to conduct its analysis. On occasion, the court

emphasizes that “the specification necessarily informs the proper construction of the claims” and that it is “appropriate for the court...to rely *heavily* on the written description for guidance as to the meaning of claims.”⁷⁰ (emphasis added). It has even criticized parties for failing to rely upon definitions that may be found within the intrinsic evidence.⁷¹ In other instances, the court has held that dictionaries may be used to help define claim terms if given proper weight, but that intrinsic evidence is of “central importance” and therefore must be consulted first.⁷² On the other hand, the Federal Circuit has criticized a trial court for improperly importing limitations from the specification into the claims, thereby restricting the claims’ scope to coverage of a single embodiment.⁷³ In early January of 2006, the majority opinion in *nCube Corp v. Seachange Intern., Inc.*⁷⁴ did not even cite *Phillips*. The dissent noted that fact and itself relied on *Phillips* to support the dissenting opinion, quoting from *Phillips* “the specification is always highly relevant to...claim construction...[and is] usually dispositive.”⁷⁵

B. The Bottom Line

At this point, practitioners may be wondering what practical information may be extracted from *Phillips* and its progeny of a handful of cases. The *Phillips* majority opinion failed to completely clarify claim construction methodology and claim construction still appears to be approached by the court on a case-by case basis.⁷⁶ The specification remains crucial and must be carefully written because it apparently will be the focus of any claim construction. One thing that is clear is that the previous presumption in favor of dictionary definitions has been jettisoned. Therefore practitioners should carefully use terms consistently in the specification and claims.

Ideally, patent prosecutors would properly anticipate the points of novelty in the invention *before* filing so that they may properly define claim terms as intended in the specification. Prosecutors may wish to consider referring to technical or general use dictionaries when choosing language to describe elements of the invention. Additionally, use of such phrases as “the present invention” or “the preferred embodiment” in the application might best be replaced by “an embodiment,” which is likely to be deemed less restrictive in the context of a litigation. Many prosecutors may cringe at the thought

of providing explicit definitions of claim terms because they wish to provide litigators with some flexibility for interpretation of the terms in the future.

Claim construction jurisprudence continues to “percolate,” although recent panel decisions post-*Phillips* do seem to have fewer dissenting opinions. In patents today, it is crucial that both prosecutors and litigators have a comprehensive working knowledge of *Phillips* and its progeny. Definitions of claim terms advocated by trial attorneys ideally will be a nicely meshed hybrid of the definition ascertainable from intrinsic evidence and that gleaned from extrinsic evidence such as a dictionary. And the trial attorney’s job can be made much easier if the patent drafter puts careful thought into crafting a patent application that applies the *Phillips* and post-*Phillips* principles.

¹ *Markman v. Westview Instruments*, 517 U.S. 370 (1996). *Markman* held that claim construction is a question of law for the court to decide, affording such rulings *de novo* review by the Federal Circuit on appeal.

² *Phillips v. AWH Corp.*, 376 F.3d 1382, 71 USPQ2d 1765 (Fed. Cir. 2004), 71 U.S.P.Q.2d 1765.

³ *Ibid.*

⁴ *Ibid.* The first panel consisted of Judges Newman, Lourie, and Dyk, in which Judge Lourie wrote for the majority and Judge Dyk dissented. *Phillips v. AWH Corp.*, 363 F.3d 1207 (Fed. Cir. 2004), 70 U.S.P.Q.2d 1417.

⁵ For a complete list of the seven questions presented by the court, see *Phillips*, 376 F.3d at 1382-83. In a concurring opinion granting the order, Judge Radar presented an additional question asking whether the court should adopt a “strictly algorithmic” set of rules for claim construction analysis. *Phillips*, 376 F.3d at 1384. Chief Judge Mayer dissented from the majority decision to grant the order for rehearing *en banc*, stating that efforts to “refine the process” of claim construction would be futile until the court is willing to reconsider its opinion in *Markman*. *Phillips*, 376 F.3d at 1384 (holding that the Federal Circuit retains the right to review claim construction rulings *de novo*).

⁶ *Phillips*, 376 F.3d at 1383-84.

⁷ *Phillips*, 415 F.3d at 1316-1319.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Vitronics Corp. v. Conception, Inc.*, 90 F.3d 1576 (Fed. Cir. 1996), 39 U.S.P.Q.2d 1573.

¹¹ *Id.* at 1312.

¹² *Id.* at 1319-24, *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193 (Fed. Cir. 2002), 64 U.S.P.Q.2d 1812.

¹³ *Id.* at 1320.

¹⁴ *Id.* at 1323.

¹⁵ *Id.* at 1309.

¹⁶ *Id.* Mr. Phillips obtained U.S. Patent No. 4,677,798 on his panels that were at issue in this case. *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* Mr. Phillips' suit included a claim for trade secret misappropriation that the court held was barred by the statute of limitations. *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Merck & Co., Inc. v. Teva Pharmaceuticals USA, Inc.*, 395 F.3d 1364, 1377-78 (Fed. Cir. 2005), *petition for rehearing en banc denied*, 405 F.3d 1338 (Fed. Cir. 2005), 73 U.S.P.Q.2d 1641.

²⁵ Darryl Woo, et. al, *Phillips v. AWH Corporation – Revisiting the Rules of Claim Construction: Still No Magic Formula*, July 13, 2005, at

http://www.fenwick.com/docstore/publications/Litigation/Litigation_Alert_07-13-05.pdf (last visited Jan.

31, 2006).

²⁶ *Merck*, 395 F.3d at 1377-78.

²⁷ *Id.*

²⁸ *Id.*, *Novartis Pharmaceuticals Corp. v. Abbott Lab.*, 375 F.3d 1328 (Fed. Cir. 2004), 71 U.S.P.Q.2d

1650, *Vitronics*, 90 F.3d 1576 (Fed. Cir. 1996).

²⁹ *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243 (Fed. Cir. 1998), 48 U.S.P.Q.2d 1117.

³⁰ *Renishaw*, 158 F.3d at 1248.

³¹ *Id.* at 1250.

³² *Astrazeneca AB v. Mutual Pharmaceutical Co., Inc.*, 384 F.3d 1333 (Fed. Cir. 2004), 72 U.S.P.Q.2d

1726.

³³ *Id.* at 1337.

³⁴ *Astrazeneca*, 384 F.3d at 1337.

³⁵ *V-Formation, Inc. v. Benetton Group SPA*, 401 F.3d 1307 (Fed. Cir. 2005), 74 U.S.P.Q.2d 1042.

³⁶ *Superguide Corp. v. DirecTV Enter., Inc.*, 358 F.3d 870 (Fed. Cir. 2004), 69 U.S.P.Q.2d 1865.

³⁷ *See generally Texas Digital*, 308 F.3d 1193.

³⁸ *Texas Digital*, 308 F.3d 1202-03.

³⁹ *Id.* at 1203.

⁴⁰ *Id.* at 1204.

⁴¹ *Id.*

⁴² *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858 (Fed. Cir. 2004), 73 U.S.P.Q.2d 1011.

⁴³ *Id.* at 862.

⁴⁴ *Id.* The court explained that “the holding in *Texas Digital* was much narrower than that to which the plaintiff alluded in the sense that dictionaries were only used to construe two of the nine claim terms at issue, in which the dictionary was consistent with the term as defined in the intrinsic evidence.” *Id.*

⁴⁵ *Id.* at 863.

⁴⁶ Sam Mamundi, *Federal Circuit rules against dictionary use*, Jul. 1, 2005, at

<http://www.managingip.com/includes/news/PRINT.asp?SID=525656&ISS-17456> (last visited Jan. 31,

2006). When the U.S. Congress commissioned the formation of the Federal Circuit in 1982, one of its

main articulated purposes was to bring consistency to patent law. *The U.S. Court of Appeals and the*

Federal Judiciary, at http://www.fjc.gov/history/home.nsf/page/ca_bdy?OpenDocument&Click= (last

visited Jan. 31, 2006). Twelve circuit judges are active members of the court. 28 U.S.C. § 44 (1997). A

panel for a usual case consists of three active judges. *United States court of appeals*, at

http://en.wikipedia.org/wiki/United_States_court_of_appeals (last visited Jan. 31, 2006).

⁴⁷ *Phillips*, 415 F.3d at 1330 (Mayer, J. dissenting), Lee Gesmer, et. al, *Federal Circuit Case Addresses*

Patent Interpretation, Jul. 2005, at <http://www.gesmer.com/advisory/072005.php> (last visited Jan. 31,

2006). The Federal Circuit reverses claim construction rulings at an astounding rate – with estimates

topping 40%. Gregory A. Castanias, et. al, *Petition for Certiorari Filed In AWH Corp. v. Phillips*, Dec.

2005, at http://www.jonesday.com/pubs/pubs_detail.aspx?pubIP=S2973, *Re-Examining Patent*

Interpretation: Too Little, Too Late?, at <http://library.findlaw.com/2005/Jan/17/133683.html> (last visited

Jan. 31, 2006). A Federal Circuit *en banc* panel consists of all twelve of its active judges. *United States*

court of appeals, at http://en.wikipedia.org/wiki/United_States_court_of_appeals (last visited Jan. 31, 2006).

⁴⁸ Lee Gesmer, et. al, *Federal Circuit Case Addresses Patent Interpretation*, Jul. 2005, at <http://www.gesmer.com/advisory/072005.php> (last visited Jan. 31, 2006).

⁴⁹ *Phillips*, 415 F.3d at 1330 (Mayer, J. dissenting).

⁵⁰ Professor Joseph S. Miller described the *Texas Digital* line of cases as “an experiment.” Professor Miller co-authored an amicus brief to the Federal Circuit in *Phillips*. He was kind enough to share his thoughts on the case and other pertinent issues with me.

⁵¹ *Phillips*, 415 F.3d at 1303.

⁵² *Nystrom v. Trex Co., Inc.*, 424 F.3d 1136 (Fed. Cir. 2005), 76 U.S.P.Q.2d 1481.

⁵³ *Free Motion Fitness, Inc. v. Cybex Intern., Inc.*, 423 F.3d 1343 (Fed. Cir. 2005), 76 U.S.P.Q.2d 1432.

⁵⁴ *Nystrom*, 424 F.3d at 1138.

⁵⁵ *Id.*

⁵⁶ *Nystrom v. Trex Co., Inc.*, 374 F.3d 1105, 1111 (Fed. Cir. 2004), *opinion currently withdrawn*. The term at issue was the word “board” and whether it would be limited to wood boards cut from a log. *Id.* at 1110-11. The specification failed to disclose a board that was not made of wood cut from a log. *Id.* One dictionary definition included boards made of synthetic materials in addition to those cut from a log. *Id.*

⁵⁷ *Id.* at 1111.

⁵⁸ *Id.*

⁵⁹ Typically, when a district court has first consulted a dictionary, a term's interpretation is broader than if the court primarily considered the specification. Under the *Texas Digital* line of cases, courts allowed parties to present evidence of dictionary definitions that encompassed a multitude of claim term interpretations so long as none of it obviously contradicted the disclosure. *Nystrom*, 424 F.3d 1145.

⁶⁰ *Id.* at 1142.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1145.

⁶⁴ *See generally Nystrom*, 424 F.3d 1136.

⁶⁵ *Free Motion Fitness*, 423 F.3d at 1347-48.

⁶⁶ *Id.* at 1348-49.

⁶⁷ *Id.* at 1349.

⁶⁸ *Id.*

⁶⁹ *See generally Free Motion Fitness*, 423 F.3d 1343.

⁷⁰ *Network Commerce, Inc. v. Microsoft Corp.*, 422 F.3d 1353, 1360 (Fed. Cir. 2005), 76 U.S.P.Q.2d 1330

(To construe the claims at issue, the court repeatedly referred to the specification to ascertain the meaning of the claim terms).

⁷¹ *Id.*

⁷² See *Aquatex Indus., Inc. v. Techniche Solutions*, 419 F.3d 1374, 1380 (Fed. Cir. 2005), 76 U.S.P.Q.2d

1213; *Terlep v. Brinkman Corp.*, 418 F.3d 1379, 1382 (Fed. Cir. 2005), 76 U.S.P.Q.2d 1053.

⁷³ *Callicrate v. Wadsworth Mfg., Inc.*, 427 F.3d 1361, 1368 (Fed. Cir. 2005), 77 U.S.P.Q.2d 1041.

⁷⁴ *nCube Corp v. Seachange Intern., Inc.*, No. 03-1341, 03-1366, 2006 WL 39053 (Fed. Cir. Jan. 9, 2006).

⁷⁵ *Id.*

⁷⁶ Dennis Crouch, *En Banc Federal Circuit Changes The Law of Claim Construction*, July 13, 2005, at

http://patentlaw.typepad.com/patent/2005/07/en_banc_federal.html (last visited Jan. 31, 2006).