

No. 13-369

IN THE
Supreme Court of the United States

NAUTILUS, INC.,

Petitioner,

v.

BIOSIG INSTRUMENTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FEDERAL CIRCUIT

**BRIEF OF *AMICUS CURIAE*
INTELLECTUAL PROPERTY OWNERS
ASSOCIATION IN SUPPORT
OF NEITHER PARTY**

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Intellectual Property Owners Association (IPO) is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in U.S. intellectual property rights.¹ IPO's membership includes more than 200 companies and a total of over 12,000 individuals who are involved in the association either through their companies or as inventor, author, executive, law firm, or attorney members. Founded in 1972, IPO represents the interests of all owners of intellectual property. IPO regularly represents the interests of its members before Congress and the USPTO and has filed *amicus curiae* briefs in this Court and other courts on significant issues of intellectual property law. The members of IPO's Board of Directors, which approved the filing of this brief, are listed in the appendix.²

IPO submits this brief because of the importance of having a meaningful standard to determine whether patent claims comply with the requirement for definiteness set forth in 35 U.S.C. § 112. In *Biosig Instruments, Inc. v. Nautilus, Inc.*, 715 F.3d 891 (Fed. Cir. 2013), the Federal Circuit held that a claim is indefinite under 35 U.S.C. § 112

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

2. IPO procedures require approval of positions in briefs by a two-thirds majority of directors present and voting.

only when it is not “amenable to construction” or “insolubly ambiguous.” IPO takes no position on the patentability of the particular claims at issue in this case, whether under 35 U.S.C. § 112 or the other conditions for patentability set forth in the Patent Act. Rather, IPO files this brief because it believes that the Federal Circuit’s current “insolubly ambiguous” standard is not consistent with the language of 35 U.S.C. § 112(b) or this Court’s precedent. Instead, IPO believes that an appropriate standard for the definiteness requirement of 35 U.S.C. § 112 should require claims to be reasonably clear to a person having ordinary skill in the art in light of the specification and prosecution history. In addition, IPO believes that the statutory presumption of validity set forth in 35 U.S.C. § 282 applies to all grounds of alleged invalidity, including indefiniteness and other validity challenges based on alleged failure to comply with 35 U.S.C. § 112.

SUMMARY OF ARGUMENT

The Patent Act requires every patent to “conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the inventor or a joint inventor regards as the invention.” 35 U.S.C. § 112(b).³ This is known as the “definiteness” requirement.

3. Paragraph 2 of 35 U.S.C. § 112 was replaced with newly designated § 112(b) when the Leahy-Smith America Invents Act (“AIA”) took effect on September 16, 2012. The pre-AIA version of § 112 applies in this case because the patent-in-suit issued prior to that date. Former Section 112, ¶ 2 is substantively identical to current Section 112(b), the former stating, in part, that “[t]he specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.”

This Court has consistently held that the requirement for definiteness is necessary to provide the public with notice of the boundaries of the patent rights, and thereby promote innovation. For over a century, this Court has required clarity in patent claims in order to protect the public from the chilling uncertainty of ambiguous claims. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 730-31 (2002) (“[A patent right] is a property right; and like any property right, its boundaries should be clear . . . clarity is essential to promote progress, because it enables investment in innovation. A patent holder should know what he owns, and the public should know what he does not.”); *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 236 (1942) (“The statutory requirement” is designed to prevent a “zone of uncertainty which . . . would discourage invention.”); *Gen. Elec. Co. v. Wabash Appliance Corp.*, 304 U.S. 364, 369 (1938) (“The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights . . . so that it may be known which features may be safely used or manufactured without a license and which may not.” (internal footnote omitted)); *Merrill v. Yeomans*, 94 U.S. 568, 573-74 (1876) (“It seems to us that nothing can be more just and fair, both to the patentee and to the public, than that the former should understand, and correctly describe, just what he has invented, and for what he claims a patent.”).

The Federal Circuit has held that a claim is indefinite only when it is “not amenable to construction” or is “insolubly ambiguous.” *Id.* (internal quotations and citations omitted). This standard has proven difficult to apply in litigation and other contexts because it is inherently unclear when a merely ambiguous claim

becomes “insolubly” ambiguous. More importantly, however, this standard fails to discourage applicants from obscuring the scope of the claimed invention, such that the public is “deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights.” *Merrill*, 94 U.S. at 573. Indeed, IPO believes that the “insoluble ambiguity” standard does not apply the statutory requirement of particular and distinct patent claiming and is not in harmony with this Court’s precedent.

IPO believes that an appropriate standard for the definiteness requirement of 35 U.S.C. § 112 would require that the claims be reasonably clear to a person having ordinary skill in the art in light of the specification and prosecution history. Such a standard finds firm grounding in this Court’s decision in *United Carbon*. *United Carbon*, 317 U.S. at 236 (“[T]he claims must be reasonably clear-cut to enable courts to determine whether novelty and invention are genuine. . . . An invention must be capable of accurate definition, and it must be accurately defined, to be patentable.”) Furthermore, IPO believes that such a “reasonable clarity” standard would be easier to apply than the current “insolubly ambiguity” standard. IPO also believes that a “reasonable clarity” standard – assessed from the standpoint of a person having ordinary skill in the art in light of the specification and prosecution history – would limit patentable claims to those that give the public reasonable notice of the scope of the subject matter that the inventor claims as his or her invention.

IPO urges caution, however, against applying the “reasonable clarity” standard – or any standard for determining claim definiteness, for that matter – in a

manner that conflates the issues of claim construction and claim definiteness. In virtually any patent infringement litigation, the parties dispute the meanings of one or more claim terms, each citing evidence to support its proffered construction of the disputed term(s). This Court's holding in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), addressed the issue of how claim terms are to be interpreted in such disputes. The fact that the patent owner and an accused infringer disagree about the meaning of a claim term does not mean that term lacks "reasonable clarity," even if each party's construction is reasonable and the correct meaning is a close question.

Finally, IPO believes that the statutory presumption of validity set forth in 35 U.S.C. § 282 applies to all grounds of alleged invalidity, including indefiniteness and other validity challenges based on alleged failure to comply with 35 U.S.C. § 112. The statutory presumption of validity does not dilute or otherwise affect the statutory need for claims to particularly point out and distinctly claim the invention. Instead, it merely assigns the burden of establishing a defense of indefiniteness on challengers.

ARGUMENT

I. The Federal Circuit's Current "Insolubly Ambiguous" Standard Is Inconsistent with the Statutory Requirement of Particular and Distinct Patent Claiming

The Federal Circuit's current "insolubly ambiguous" standard for indefiniteness is not in accordance with the language of 35 U.S.C. § 112 or this Court's precedent. Congress determined that every patent specification "shall

conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the inventor or a joint inventor regards as the invention.” 35 U.S.C. § 112(b). This Court has consistently emphasized the importance of requiring clear, understandable claims. In *General Electric*, this Court explained:

The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others, and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights. The inventor must inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not.

Gen. Elec., 304 U.S. at 369.

This Court expanded on the requirement for clear claiming in its decision in *United Carbon*. In *United Carbon*, this Court held that “[t]he statutory requirement of particularity and distinctness in claims is met only when they clearly distinguish what is claimed from what went before in the art and clearly circumscribe what is foreclosed from future enterprise.” 317 U.S. at 236. This Court further emphasized that a “zone of uncertainty” surrounding the scope of patent claims “would discourage invention only a little less than unequivocal foreclosure of the field.” *Id.*

Indeed, this Court’s recognition of the need to avoid vague and indefinite claims dates back to the 19th century. “[T]he very purpose” of a patent claim is to “mak[e] the patentee define *precisely* what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms.” *White v. Dunbar*, 119 U.S. 47, 52 (1886) (emphasis added); *see also Merrill*, 94 U.S. at 573-74; *Evans v. Eaton*, 20 U.S. 356, 434 (1822) (a patent must give “warning”: “to put the public in possession of what the [patentee] claims as his own invention, so as . . . to guard against prejudice or injury from the use of an invention which the party may otherwise innocently suppose not to be patented,” and “at the same time . . . taking from the inventor the means of practising upon the credulity or the fears of other persons, by pretending that his invention is more than what it really is”). “This clarity is essential to promote progress, because it enables efficient investment in innovation. A patent holder should know what he owns, and the public should know what he does not.” *Festo*, 535 U.S. at 730-31.

The Federal Circuit’s “insolubly ambiguous” standard cannot be squared with the statute’s requirement for claims particularly pointing out and distinctly claiming the invention. In addition, the current standard is not consistent with the decisions of this Court relating to the required clarity of patent claims. The fundamental problem with the “insolubly ambiguous” standard is that it sets the bar too low for patentability. The current standard does not provide members of the public (or district court judges) with a meaningful standard that can be easily applied to determine whether a given patent claim complies with the statute’s requirement for particularity and definiteness.

Indeed, the current standard used by the Federal Circuit encourages, rather than discourages, deliberately poor patent claim drafting, i.e., the drafting of claims with the intent to create ambiguity rather than give true notice of what was invented. Under the “insolubly ambiguous” standard, too many patents leave potential infringers with great difficulty reliably determining whether particular activities would infringe. See Michael Risch, *The Failure of Public Notice in Patent Prosecution*, 21 Harv. J.L. & Tech. 179, 188 (2007) (“Patent applicants have an incentive to allow claims to remain vague so that they can mold the claims to fit the future product of a currently unknown, potential infringer or to avoid invalidation if previously undiscovered prior art comes to light.”); R. Polk Wagner, *Understanding Patent-Quality Mechanisms*, 157 U. Pa. L. Rev. 2135, 2149 (2009) (“[A] patentee will almost certainly seek substantial vagueness, thus gaining flexibility to effectively alter the scope and description of the patent according to changing circumstances.”).

Based on the current standard, the “zone of uncertainty” created by ambiguous claims (that may or may not be “insolubly ambiguous”) may result in undue chilling of competitive design-around activity or may be leveraged to extract unwarranted royalties and litigation settlements from competitors and other members of the public. IPO believes that a proper standard for indefiniteness in accordance with the statute’s language and this Court’s jurisprudence would impose the risk of avoiding claim ambiguity squarely on the drafter of those claims, rather than on the public. Patentees should be required to make their claims reasonably understandable to the relevant members of the public, i.e., the persons of ordinary skill in the art. Therefore, IPO believes that

the Federal Circuit’s current “insolubly ambiguous” standard is inconsistent with the statutory requirement of particular and distinct patent claiming, and a different standard for definiteness should apply.

II. A “Reasonable Clarity” Standard Should Apply to the Definiteness Requirement of 35 U.S.C. § 112

IPO believes that an appropriate standard for the definiteness requirement of 35 U.S.C. § 112 would require that the claims be reasonably clear to a person having ordinary skill in the art in light of the specification and prosecution history.⁴ Such a “reasonable clarity” standard would be easier to apply to specific claims than the current “insolubly ambiguous” standard. Further, a “reasonable clarity” standard would limit patentable claims to those claims that give the relevant public (i.e., those of skill in the art) reasonable notice of the scope of the subject matter that the inventor claims as his or her invention.

However, IPO believes it is vitally important to the patent system that the definiteness standard of 35 U.S.C. § 112 not be applied in an overly rigid or formulaic manner. Inventors need to be able to claim their inventions in ways that make sense in the context of the particular invention and relevant art area. For example, the mere existence of an argument concerning claim construction does not render a claim indefinite. Experience teaches us that virtually all patents involved in litigation legitimately

4. In accordance with this Court’s decision in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), the district court may need to consult extrinsic evidence, such as technical dictionaries or the testimony of experts, in order to understand what the words used in the claims mean to one of skill in the art.

require at least some claim construction by the court. However, the fact that a district court is called upon to construe a claim term in accordance with this Court's holding in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) should not automatically (or presumptively) render that claim indefinite. To hold otherwise would improperly reward attempts by accused infringers to create ambiguity during the claim construction process where no significant ambiguity exists.⁵

Further, indefiniteness should not be confused with over-breadth. The accuracy and precision of a claim is a distinct consideration from the narrow or broad scope of that claim. A claim can be reasonably understandable (and therefore definite) and still be quite broad, as long as a person having ordinary skill in the art can understand the metes and bounds of the claim. See *Ultimax Cement Mfg. Corp. v. CTS Cement Mfg. Corp.*, 587 F.3d 1339, 1352 (Fed. Cir. 2009) (“Merely claiming broadly does not render a claim insolubly ambiguous, nor does it prevent the public from understanding the scope of the patent.”); *SmithKline Beecham Corp. v. Apotex Corp.*, 403 F.3d 1331, 1340–41 (Fed. Cir. 2005) (“Breadth is not indefiniteness.”).⁶ The scope of the claim is a question of

5. This is consistent with the Federal Circuit's statement that “the definiteness of claim terms depends on whether those terms can be given any reasonable meaning.” *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1347 (Fed. Cir. 2005).

6. The distinction between indefiniteness and claim scope applies equally to the scope of the claim as a whole as well as to individual elements of the claim. Indeed, the scope of an individual claim element may be rendered reasonably clear in the context of the entire claim.

legal claim interpretation. And while a claim with a broad scope may raise other validity issues (such as anticipation, obviousness, enablement and lack of written description), these other issues are independent of whether the claim is definite under 35 U.S.C. § 112.

Notably, qualifying modifiers such as “about” and “substantially” have been used in claim drafting for many decades. It is IPO’s belief, based on the longstanding experience of its members, that the use of such terms does not *necessarily* render a claim indefinite as long as a person having ordinary skill in the art can reasonably understand the scope of the claim. The Federal Circuit has held that these words can appropriately help an inventor protect the full scope of his or her invention in situations where numerical precision or an otherwise overly strict boundary would describe the invention too narrowly. *See Verve, LLC v. Crane Cams, Inc.*, 311 F.3d 1116, 1120 (Fed. Cir. 2002) (“Expressions such as ‘substantially’ are used in patent documents when warranted by the nature of the invention, in order to accommodate the minor variations that may be appropriate to secure the invention. Such usage may well satisfy the charge to ‘particularly point out and distinctly claim’ the invention, 35 U.S.C. § 112, and indeed may be necessary in order to provide the inventor with the benefit of his invention.”); *Ecolab, Inc. v. Envirochem, Inc.*, 264 F.3d 1358, 1367 (Fed. Cir. 2001) (quoting *Pall Corp. v. Micron Separations, Inc.*, 66 F.3d 1211, 1217 (Fed. Cir. 1995) (“[L]ike the term ‘about,’ the term ‘substantially’ is a descriptive term commonly used in patent claims to “avoid a strict numerical boundary to the specified parameter.”). To presume that the use of such traditional, qualifying terms renders a claim *per se* indefinite would upset the settled expectations of the

patent system and should be avoided. *See Festo*, 535 U.S. at 739.

Taking all of these factors into account, IPO urges the Court to adopt a definiteness standard under 35 U.S.C. § 112 requiring the scope of a patent claim to be reasonably clear to a person having ordinary skill in the art in light of the specification and prosecution history.

III. The Presumption of Validity Set Forth in 35 U.S.C. § 282 Is Consistent with the Statutory Requirement of Particular and Distinct Patent Claiming

Under 35 U.S.C. § 282, each claim of a patent is independently presumed by law to be valid. “The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such validity.” 35 U.S.C. § 282(a). Indefiniteness is one of the invalidity defenses set forth in 35 U.S.C. § 282(b)(3)(A). Accordingly, patent claims are presumed definite, and the Federal Circuit has properly followed Congress’ statutory framework on this point. Moreover, this Court recently upheld the traditional view that the presumption of validity applies to invalidity defenses. *See Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238 (2011) (holding that defenses to patent infringement claims must be proved by clear and convincing evidence).

Indeed, validity challenges based on alleged failure to comply with the conditions for patentability set forth in Section 112 present an even clearer case for the presumption of validity based on the presumption of administrative correctness than did the prior art validity challenges at issue in the *Microsoft v. i4i* case. In *Microsoft*, the Court held that the presumption of validity mandated

by Congress in Section 282 applies to all prior art, whether or not previously before the PTO during prosecution, and specifically rejected Microsoft's argument that the presumption should not apply to art that was not before the PTO during prosecution. In contrast, Section 112 does not involve the situation where relevant information was not before the PTO during prosecution of the patent application. The PTO is charged with examining every patent claim in every patent application for compliance with the requirements for patentability in Section 112, including specifically the 112(b) requirement that the claims be sufficiently definite.

Thus, in addition to the fact that Section 282 does not exempt Section 112 validity challenges from the statutory presumption of validity, the presumption of administrative correctness fully supports the presumption of validity as well. It is never the case that new information is presented in litigation that was not before the PTO during prosecution -- in other words, every 112 defense in litigation is a direct challenge to the correctness of the PTO's decision that the claim is sufficiently definite, based on the same record the PTO previously considered. As such, the challenger should bear the burden of overcoming the presumption that the PTO made the correct decision.

IPO does not believe that this statutory presumption of validity dilutes the parallel requirement in the statute that claims particularly point out and distinctly claim the invention. Instead, the presumption of validity acts to assign to challengers of the patent's validity the burden of establishing the defense of indefiniteness. An accused infringer can overcome the presumption of definiteness by showing "by clear and convincing evidence that a

skilled artisan could not discern the boundaries of the claim based on the claim language, the specification, and the prosecution history, as well as her knowledge of the relevant art area.” *Halliburton Energy Servs., Inc. v. M-I LLC*, 514 F.3d 1244, 1249-50 (Fed. Cir. 2008).

IPO believes that the statutory presumption of validity set forth in 35 U.S.C. § 282 applies to all grounds of alleged invalidity, including indefiniteness and other validity challenges based on alleged failure to comply with 35 U.S.C. § 112. In addition, IPO believes that the statutory presumption of validity is fully consistent with the statutory need for claims to particularly point out and distinctly claim the invention.

CONCLUSION

IPO urges the Court to discard the Federal Circuit’s current “insolubly ambiguous” standard for indefiniteness. Instead, IPO urges the Court to adopt a “reasonable clarity” standard that would require that the claims be reasonably understandable to a person having ordinary skill in the art in light of the specification and prosecution history. IPO believes that a “reasonable clarity” standard would limit patentable claims to those claims that give the public reasonable notice of the scope of the subject matter that the inventor claims as his or her invention. Further, IPO urges the Court to apply the statutory presumption of validity set forth in 35 U.S.C. § 282 to all grounds of alleged invalidity, including indefiniteness.

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