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Independence Day

## “Tip of the Month”

### Functional Language in Patent Claims – the Federal Circuit Finally Corrects Its Recent, Misguided Standard!

Means-plus-function claiming is authorized by 35 U.S.C. § 112 ¶ 6 (¶ (f) under the recent America Invents Act). This law provides that an element in a patent claim for a combination may be expressed as a “means” for performing a specified function without the reciting supporting structure, material, or acts. Such a claim will also be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof. In determining whether a claim limitation is to be construed as a means-plus-function limitation under § 112 ¶ 6, the Federal Circuit has long recognized the importance of the presence or absence of the word “means”.

The Federal Circuit held in a 1998 case that the use of the word “means” creates a rebuttable presumption that § 112 ¶ 6 applies, while the absence of the word “means” similarly creates a rebuttable presumption that § 112 ¶ 6 does not apply. In a 2000 case, the Federal Circuit held that § 112 ¶ 6 is presumed to not apply when a functional claim limitation lacks the word “means,” but that the presumption can nonetheless be overcome if the claim term fails to “recite sufficiently definite structure” or else recites “function without reciting sufficient structure for performing that function.” That is, simply omitting the word “means” does not necessarily avoid means-plus-function treatment.

Over time, however, the Federal Circuit established a heightened burden for overcoming the presumption that § 112 ¶ 6 does not apply to a limitation expressed in functional language that fails to use the word “means.” In 2004, the Federal Circuit applied a different standard, holding that “the presumption flowing from the absence of the term ‘means’ is a strong one that is not readily overcome.” Then in 2012, the Federal Circuit raised the bar even higher, declaring that “[w]hen the claim drafter has not signaled his intent to invoke § 112, ¶ 6 by using the term ‘means,’ we are unwilling to apply that provision without a showing that the limitation essentially is devoid of anything that can be construed as structure.”

On June 16, 2015, in the *en banc* portion of *Williamson v. Citrix Online, LLC*, the Federal Circuit finally overruled its heightened standard from 2012 ruling, now holding that such a heightened standard is improper. Additionally, the Court expressly overruled the characterization of the rebuttable presumption as “strong” and that § 112 ¶ 6 does not apply in the case where a limitation lacks the word “means.” According to the *en banc* decision, when a claim term lacks the word “means,” the proper standard for overcoming the presumption, that § 112 ¶ 6 does not apply, is whether the claim term fails to “recite sufficiently definite structure” or else “recites function without reciting sufficient structure for performing that function.”

The Federal Circuit has finally returned the functional claim language standard to a common sense, plain reading of the statute. This line of cases from the Federal Circuit over the last ten years shows how legal standards can change and affect case outcomes. If nothing else, these cases relating to functional claim language highlight the meaning of the statement “timing is everything.”

If you have any questions regarding your own patents or any patents you may wish to buy, then call the attorneys at Mesmer & Deleault today at 668-1971, or contact us by email at [mailbox@biz-patlaw.com](mailto:mailbox@biz-patlaw.com).

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