

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

LIGHTING BALLAST CONTROL LLC,
Plaintiff-Appellee,

v.

PHILIPS ELECTRONICS NORTH AMERICA CORPORATION,
Defendant,

and

UNIVERSAL LIGHTING TECHNOLOGIES, INC.
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of
Texas in case no. 09-CV-0029, Judge Reed O'Connor.

**BRIEF FOR AMICUS CURIAE,
AUSTIN INTELLECTUAL PROPERTY LAW ASSOCIATION ON
REHEARING *EN BANC* IN SUPPORT OF NEITHER PARTY**

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CERTIFICATE OF INTEREST

Counsel for amicus curiae, the Austin Intellectual Property Law Association, certifies the following pursuant to Federal Circuit Rules 27(a)(7) and 47.4(a):

1. The full name of every party or amicus represented by us is: The Austin Intellectual Property Law Association.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is: Not applicable.

3. All parent corporations and publicly held companies that own 10% or more of the party or amicus curiae represented by me are: Not applicable.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: Law Office of Jennifer Kuhn: Jennifer Kuhn; Wilson Sonsini Goodrich & Rosati PC: Aden M. Allen.

June 4, 2013

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STATEMENT OF AUTHORSHIP AND FUNDING

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the Austin Intellectual Property Law Association states that this brief was authored by Jennifer C. Kuhn, Esq., Amicus Committee Chair for Austin Intellectual Property Law Association, and Aden M. Allen, Esq., member of Austin Intellectual Property Law Association. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.¹

¹ After reasonable investigation, the Austin IPLA believes that (a) no member of its Amicus Committee or its Board who voted for the Austin IPLA to prepare this brief, and no attorney in the law firm or corporation of such a board or committee member, represents a party to this litigation, (b) no Counsel or other representative of any party to this litigation participated in the authorship of this brief, and (c) no one other than the Austin IPLA, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief. Some Committee members or attorneys in their respective law firms or corporations may represent entities which have an interest in other matters which may be affected by the outcome of this litigation.

I. IDENTIFICATION, STATEMENT OF INTEREST, AND SOURCE OF AUTHORITY TO FILE OF AMICUS CURIAE

Amicus curiae Austin Intellectual Property Law Association (“Austin IPLA”) is a bar association located in Austin, Texas with approximately 300 members engaged in private and corporate practice across a wide range of industries and technologies. (See www.austin-ipla.org.) Austin IPLA members represent both the owners of and users of intellectual property.

Austin IPLA takes no position on the ultimate outcome of this matter, and specifically takes no position on whether Appellant’s particular claim limitation is a mean-plus-function claim limitation. Austin IPLA’s sole interest is that the integrity of the Patent Act be maintained through consistent interpretation of both statutes and patents.

Authority to file this amicus brief was provided by the Court’s Order for rehearing *en banc* dated March 15, 2013.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Patent law is in no way exempt from the general rules of law that apply to all other areas of law. Austin IPLA argued from this basic premise in its previous amicus brief in *Bilski v. Kappos* and the Supreme Court adopted those arguments *in toto* in its decision. See 130 S.Ct. 3218 (2010) and www.austin-ipla.org/bilski_v_doll.pdf. In *Bilski*, the Supreme Court cited both patent and *non-*

patent statutory interpretation precedent. Accordingly, when faced with determining whether a district court's resolution of an issue should be reviewed *de novo* by the appellate court, or whether it should be given deference, this Court should look not only to patent law precedent, but also *non-patent* statutory interpretation precedent.

Austin IPLA expects that the parties and other *amici* may focus their arguments exclusively on *patent* related jurisprudence. So as to avoid arguments already presented by others, Austin IPLA focuses instead on the parallel treatment of statutes and patents as *written evidence* under Supreme Court and Federal Circuit law. The Supreme Court's precedent interpreting *written evidence* overwhelmingly shows that the Federal Circuit must continue to review district court patent claim construction on a *de novo* basis so that patent laws conform with the fundamental principles of law that govern all other areas of American jurisprudence.

III. The Federal Circuit Should Retain the *De Novo* Standard of Review of District Court Patent Claim Construction to Keep this Court's Treatment of Written Evidence Consistent

A. The Federal Circuit Should Not Violate the Canon That Written Evidence is Always Construed by the Court and Reviewed *De Novo*

If the Federal Circuit held that a patent was not to be interpreted and

reviewed as a matter of law, it would violate a long-standing principal of American law that “the construction of written evidence is exclusively with the court.” *Levy v. Gadsby*, 7 U.S. (3 Cranch) 180, 186 (1805). *See also Goddard v. Foster* 84 U.S. 123, 142 (1873) (“The law I take to be this: that it is the duty of the court to construe all written instruments.”) (citations omitted). It would further violate the principle that “[a]ppellate courts have untrammelled [sic] power to interpret written documents.” *Eddy v. Prudence Bonds Corp.* 165 F.2d 157, 163 (2d Cir. 1947) (Hand, J.). Statutes and patents, like other written legal documents are subject to common interpretation issues, and the resolution of those issues is properly the province of the judge. *Id.* *See also Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 382-83 nn.7-9 (1996).

Written evidence, such as statutes and patents, should be treated consistently regardless of their source, and the goal of the Court in this matter should be to guide the law of patent claim construction into *more* conformity with the general law covering the interpretation of written evidence. Changing the standard of appellate review from *de novo* appellate review to any other standard of appellate review has no basis in the law and cannot be justified on the basis of any difference in the way courts traditionally approach statutory construction and patent claim construction.

B. Courts Use the Same Arguments to Interpret Statutes and Patents, and These Arguments Should be Subject to the Same Standards of Review

Statutes and patents, like other written legal documents, are subject to common interpretation issues, and the resolution of those issues is properly the province of the judge. *See Markman*, 517 U.S. at 382-83 nn.7-9 (1996).² As the resolution of statutory interpretation issues are always subject to *de novo* review by the appellate court, *see NTP, Inc. v. Research in Motion, Ltd*, 392 F.3d 1336, 1368 (Fed. Cir. 2004), so should the resolution of patent claim construction issues.

While this Court has acknowledged the similarity between statutory interpretation and claim construction in passing, the striking similarities in the arguments and approaches in both statutory interpretation and patent claim construction justify continuing to review patent claim construction *de novo*. This brief will address each of these interpretation arguments in turn.

1. The Argument from Ordinary Meaning Supports Maintaining *De Novo* Review of Patent Claim Construction

As the Supreme Court made clear in *Bilski*, the first step in interpreting a

² For additional background on statutory and patent interpretation issues please see *Interpreting Statutes: A Comparative Study*, 408-411 (D. Neil McCormick and Robert S. Summers, eds., Dartmouth Publishing 1991) and Peter S. Menell, Matthew D. Powers & Steven C. Carlson, *Patent Claim Construction: A Modern Synthesis and Structured Framework*, 25 *Berkeley Tech. L.J.* 713, 739-66 (2010).

statute or a patent is the same:

In patent law, as in all statutory construction, “[u]nless otherwise defined, ‘words will be interpreted as taking their ordinary, contemporary, common meaning.’”

Bilski v. Kappos, 130 S. Ct. 3218, 3226 (2010) (quoting *Diamond v. Diehr*, 450 U.S. 175, 182 (1981)). The ordinary meaning argument directs district court judges to this “fundamental canon of statutory construction” to determine the meaning of disputed statutory terms. *Perrin v. United States*, 444 U.S. 37, 42 (1979). The statutory ordinary meaning argument also asks the district court to posit what the statute would mean to a hypothetical “ordinary person” who has “a right to rely on ordinary words addressed at him.” *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1944). See *Interpreting Statutes*, *supra* at 412.

Similarly, in patent claim construction the Federal Circuit has frequently directed district courts to give the words used in the patent claims their ordinary and customary meaning. See *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005). Instead of a hypothetical “ordinary person,” the district court is asked to posit what the patent claim language would mean to a hypothetical “person of ordinary skill in the art” of the patent at the time of the invention. See *id.* at 1313. In both cases, district courts interpret the written evidence in question by determining what it would mean to an ordinary member of the *intended audience*.

In both statute and patent interpretation, the district court may use a dictionary to determine what the ordinary meaning of a disputed term is, as long as that definition fits with the overall context of the document. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 113-14 (1988) (definition of “criteria” in statute); *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U.S. 126, 134 (1942) (definition of “embedded” in patent claim); *see also Phillips*, 415 F.3d at 1322-23. The district court may also rely on grammar and syntax to determine the ordinary meaning of the disputed term. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241-42 (1989) (interpreting the phrase “interest on such claim”); *Ariad Pharms. v. Eli Lilly & Co.*, 598 F.3d 1336, 1344 (Fed. Cir. 2010) (*en banc*); *Superguide Corp. v. DirecTV Enterprises, Inc.*, 358 F.3d 870, 886 (Fed. Cir. 2004) (interpreting the phrase “at least one of”).

Finally, the district court must ignore the ordinary meaning of a term in both statute and patent interpretation if the drafter of the document acted as his own lexicographer and defined a term used in the statute or patent claim. In *Bilski*, the Supreme Court reversed the Federal Circuit’s *en banc* decision that did not give any weight to the statutory definition of process: ““When a statute includes an explicit definition, we must follow that definition.”” *Bilski*, 130 S.Ct. at 3226 (quoting *Burgess v. United States*, 553 U.S. 124, 130 (2008)). Similarly, when a patentee uses a special meaning of a claim term in the patent specification, then

“the inventor’s lexicography governs.” *Phi.lips*, 415 F.3d at 1316.

For both statutes and patents, the district court is charged with determining what the “ordinary meaning” of the terms are, and the court uses the same sources, such as dictionaries and grammar treatises, to determine such. Further, just as for terms in a statute, the district court will respect the definition of any patent term if the patentee has acted as his own lexicographer. Thus, based on the ordinary language analysis of statutory and patent interpretation, there is no reason for this Court to apply a different standard of review to patent claim construction than statutory interpretation.

2. The Argument from Technical Meaning Supports Maintaining *De Novo* Review of Patent Claim Construction

Second, for both statutes and patents the ordinary meaning of a disputed term may be “trumped” if that term has a specialized, technical meaning. *See Greenleaf v. Goodrich*, 101 U.S. 278, 284 (1880). For statutes, this technical meaning can be a standard legal meaning, as in *Kungys v. United States*, 485 U.S. 759, 770 (1988) (using specialized legal meaning of “materiality” over ordinary meaning). Or it can be a standard meaning that the term has in a specialized trade or technology. *See Louisiana Pub. Serv. Comm’n v. Fed. Commc’ns*, 476 U.S. 355, 371-73 (1986) (using meanings of “charges,” “classifications,” and “practices” from the relevant trade). So a district court may set aside the “ordinary

meaning” of a statutory term if there is evidence of a specialized meaning for that term.

Similarly, district courts frequently weigh evidence in patent cases showing that a term with an ordinary meaning has a special meaning in the technical field of the patent, such as the terms “stable” and “dimension” in *Hoechst Celanese Corp. v. BP Chems. Ltd.*, 78 F.3d 1575, 1578 (Fed. Cir. 1996). Further, when interpreting claim terms such as “comprising” and “consisting,” district courts must apply their meaning as “terms of art” in patent law, rather than their ordinary meaning to a person of skill in the relevant art of the patent. *See CIAS, Inc. v. Alliance Gaming Corp.*, 504 F.3d 1356, 1359-61 (Fed. Cir. 2007). In *CIAS* the Federal Circuit specifically rejected the ordinary meaning of “comprised of” in favor of its understood meaning in the “patent convention.” *Id.* at 1360-61.

As shown, district courts are charged with taking evidence of specialized meanings in both statutory interpretation and patent interpretation, and they follow the same steps in determining whether those specialized meanings supersede the ordinary meaning. Accordingly, there is no reason for this Court to apply a different standard of review to patent decisions than statutory interpretation decisions based on the argument from technical meaning.

3. The Argument from Legislative History or Prosecution History Support Maintaining *De Novo* Appellate Review of Patent Claim Construction

Third, statutory interpretation and patent claim construction require district courts to look at background legal documents for context to confirm the meaning of disputed terms. District courts frequently look to the legislative history of a statute to determine if Congress intended some meaning different from the ordinary meaning of the language used in the statute. In *Corning Glass Works v. Brennan*, the Supreme Court found that Congress had specifically incorporated terms with specialized meanings in industry by referring to the statute’s legislative history. 417 U.S. 188, 199-201 (1974) (interpreting “similar working conditions” among other terms). Similarly, if the legislative history indicates that the drafters had a clear intent that is at odds with the plain meaning of the statute, the proper construction will reflect that intent. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

For patent claim construction, district courts frequently rely on the patent’s prosecution history. *Phillips*, 415 F.3d at 1318. The prosecution history can narrow the meaning of the claim terms by showing how the inventor understood the invention, or by showing that the inventor limited the invention in the course of prosecution. *Id.* If a patentee shows a clear intent to disavow claim scope to obtain allowance of the claim, “the doctrine of prosecution disclaimer attaches and

narrows the ordinary meaning of the claim...” *Omega Eng’g., Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed. Cir. 2003) (emphasis added).

In sum, both statutory interpretation and claim construction require the district court to review background legal documents, like the legislative history or prosecution history, to determine if those background documents support a meaning other than the ordinary meaning for a disputed term. As such, there is no difference between the two approaches that would justify applying a different standard on appeal.

4. The Argument from Avoiding Unconstitutional or Invalid Interpretations.

Lastly, long-held doctrines in statutory interpretation and patent claim construction direct courts to avoid invalidating statutes and patent claims when possible. The Supreme Court has long held that statutes should be interpreted to avoid engendering constitutional issues. *See Gomez v. United States*, 490 U.S. 858, 864 (1989). When a district court evaluates two competing statutory interpretations, one of which violates the Constitution, the district court should always adopt the meaning that does not. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2593 (2012). Indeed, the Supreme Court requires courts to use “every reasonable construction” to save a statute from unconstitutionality. *Id.* at 2594. Similarly in *Turill v. Michigan Southern & Northern Indiana*

Railroad, the Supreme Court stated that patent claims are “to be so interpreted as to uphold and not to destroy the right of the inventor.” 68 U.S. (1 Wall.) 491, 510 (1863). The Federal Circuit has always followed this principle and directs district courts to apply all available tools of claim construction to preserve the validity of the claim. *See Phillips*, 415 F.3d at 1327.

Moreover, the rationales behind these doctrines of statutory interpretation and patent claim construction are similar. For statutes, the basis of the presumption is that Congress is presumed to have enacted statutes within constitutional limits. *United States v. Harris*, 106 U.S. 629, 635 (1883) (“Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that congress will pass no act not within its constitutional power.”); *see also United States v. Morrison*, 529 U.S. 598, 607 (2000). Likewise, for patents, even before the presumption of validity was codified, it was presumed that the Commissioner did his duty and did not issue an invalid patent. *See Phillips*, 415 F.3d at 1327 (citing *Klein v. Russell*, 86 U.S. (19 Wall.) 433, 466 (1873)).

Accordingly, since the duties of the district court are so similar in evaluating statutory interpretations and patent claim constructions for unconstitutionality or invalidity, there is no support for treating statutory interpretation and patent claim construction differently on appeal.

IV. Patent Claim Construction And Statutory Interpretation Decisions By District Courts Should Both Be Reviewed *De Novo*.

As shown, statutory and patents are both written evidence, and interpreting them requires district courts to perform identical analysis, review identical types of evidence and apply identical arguments. There is no reason that appellate review of one should be different from the other. Thus, as a district court's statutory interpretation is reviewed by this Court *de novo*, a district court's patent claim construction should be reviewed *de novo* as well.

Dated: June 4, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2013, I electronically served a copy of the foregoing **BRIEF FOR AMICUS CURIAE, AUSTIN INTELLECTUAL PROPERTY LAW ASSOCIATION ON REHEARING *EN BANC* IN SUPPORT OF NEITHER PARTY** via the Court's CM/ECF system, which will serve all parties as follows.

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I certify that the foregoing **BRIEF FOR AMICUS CURIAE, AUSTIN INTELLECTUAL PROPERTY LAW ASSOCIATION ON REHEARING *EN BANC* IN SUPPORT OF NEITHER PARTY** contains 2,583 words as measured by the word-processing software used to prepare this brief, excluding those portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) or Federal Circuit Rule 32(b), and therefore complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 29(d).

The foregoing brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-sized font, Times New Roman and therefore complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

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