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IP Strategies

"Can I Have a Do Over, Please?" Reflections on Certain Provisions of the America Invents Act

"Do Over" is an informal phrase meaning "to do something over," and in American English it can be further defined as, "to do something again from the beginning, especially because you did it badly the first time."[1] According to historian Frederick Jackson Turner, "The peculiarity of American institutions is the fact that they have been compelled to adapt themselves to the changes of an expanding people—to the changes involved in crossing a continent, in winning a wilderness, and in developing at each area of this progress out of the primitive economic and political conditions of the frontier into the complexity of city life."[2] If this "adapt[ation] … to … change[]" and ability to "develop[] … progress out of … primitive economic and political conditions" is an American trait that may be summarized with the catchphrase, "Americans reinvent themselves," then it is not surprising that provisions of the America Invents Act (AIA)[3] reflect America adapting to patent systems globally and include some uniquely American "Do Over" provisions.

Similarly, and consistent with Turner's observations on Americans, the AIA provides for a new chapter in U.S. patent law, one in which there will be "Post-Grant Review" (PGR) proceedings before the United States Patent & Trademark Office (USPTO) that are similar in some respects to European opposition proceedings, but uniquely American in others.[4]

Consistent with PGR being before the USPTO, the threshold for a third-party petitioner in PGR to initiate the proceedings is providing information that, if not rebutted, would demonstrate that it is more likely than not that at least one of the claims challenged is unpatentable. Likewise, to prevail on invalidity, the third-party petitioner must provide a preponderance of the evidence that the claim challenged is unpatentable.

Like its European predecessor, PGR of Chapter 32 of Title 35 of the United States Code (USC) must be filed within nine months of the grant of a U.S. patent. Also in PGR, invalidity may be asserted on any of the grounds that one may raise as a defense in patent infringement litigation before the courts under 35 U.S.C. § 282, including failure of the claims to define subject matter eligible for patenting, lack of novelty, obviousness and to provide a written description or enablement under 35 U.S.C. §§ 101, 102, 103 and 112.

However, perhaps an initial uniquely American twist is that in PGR the third-party petitioner may also raise lack of clarity or lack of definiteness under

[1] *See* MacMillan Dictionary, available online at http://www.macmillandictionary.com/dictionary/american/do-over (last accessed 9 October 2011).

[2] Frederick Jackson Turner, "The Significance of the Frontier in American History" (1893) (first delivered to a gathering of historians in 1893 in Chicago, at the site of the World's Columbian Exposition, an enormous fair to mark the four-hundredth anniversary of Columbus' voyage), available online at http://xroads.virginia.edu/~HYPER/TURNER/chapter1.html (last accessed 9 October 2011).

[3] Leahy-Smith America Invents Act, H.R. 1249 (112th Congress, First Session), enacted (President Obama) 16 September 2011, available online at http://www.govtrack.us/congress/billtext.xpd?bill=h112-1249 (last accessed 9 October 2011).

[4] *Id*. at § 6. Post-Grant Review under what becomes Chapter 32 of Title 35 of the United States Code comes into effect 16 March 2013, 18 months after enactment of the AIA.

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35 U.S.C. § 112, whereas lack of clarity under Article 84 of the European Patent Convention (EPC) is not grounds for opposition proceedings. Another possible uniquely American twist to PGR is that estoppel will result from PGR. The third-party petitioner in PGR "may not request or maintain a proceeding before the USPTO with respect to that claim [challenged on PGR] on any ground that the petitioner raised or reasonably could have raised during that post-grant review." Further, the third-party petitioner may not assert invalidity in a civil action "on any ground that the petitioner raised or reasonably could have raised during that post-grant review."

Further still, for initiating a PGR proceeding, the third party's written petition must identify with particularity each claim challenged and the grounds on which the challenge to each claim is based, and it must provide the evidence that supports the grounds for the challenge to each claim, including patents and printed publications and affidavits or declarations of supporting evidence and opinions, if the petitioner relies on other factual evidence or on expert opinions. Dovetailing with that, the USPTO is called upon in the AIA to set standards and procedures for discovery of relevant evidence in PGR, including that such discovery shall be limited to evidence directly related to factual assertions advanced by either party in the proceeding. As some American-style discovery in PGR is expected, it seems more akin to an American patent litigation than to an opposition proceeding. But a most uniquely American twist—in contrast to opposition proceedings—is that it will be possible to terminate PGR through settlement by the parties.

Patent unenforceability due to inequitable conduct,[5] also sometimes termed "fraud on the patent office," is also a most uniquely American concept of global patent law. As discussed in the recent *Therasense* Federal Circuit case, it may arise from the failure to disclose to the USPTO, with an intent to deceive, material information, e.g., patent or printed publication, but-for which the claim or claims would not have issued.[6] In present practice, neither patent reissue nor patent reexamination is meant to cure fraud on the patent office. The AIA seeks to address charges of inequitable conduct and possible deficiencies of present reissue and reexamination proceedings by introducing "Supplemental Examination" (SE) proceedings.[7]

SE is a Do Over—an examination at the request of the Patent Owner to consider, reconsider or correct information believed to be relevant to the patent. The AIA does not limit the submitted information to patents or printed publications, and thus it may be any information believed to be relevant to the patent. Specifically, information that was known but not previously disclosed to the USPTO during original examination is not excluded and may be the subject of SE. SE is to conclude within three months of the request with a certificate indicating whether the information presented in the request raises a substantial new question (SNQ) of patentability. If USPTO agrees that the information raises an SNQ, then the USPTO is to initiate *ex parte* re-examination against the patent. As a corollary, it seems that if a patent owner becomes aware of information, SE may be used to ascertain whether that information is "but-for material" under *Therasense,* and possibly minimize litigation allegations as to it, including if the information does raise an SNQ, by dealing with it in proceedings before the USPTO. Moreover, as is a Do Over, SE is also uniquely American.

PGR and SE highlight just some of the many other aspects of the AIA that have reflections in practice abroad, but also uniquely American twists,[8] thereby making the AIA live up to its name of "America Invents."[9] Accordingly, the AIA may enable the view of a patent situation from the vantage of the American patent system to provide some of the best global strategies.[10]

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[5] *See, e.g., Therasense, Inc. v. Becton, Dickinson & Co.*, -- F.3d --, 99 U.S.P.Q.2d 1065 (Fed. Cir. 2011).

[6] *Id*.

[7] Leahy-Smith America Invents Act, H.R. 1249 (112th Congress, First Session), enacted (President Obama) 16 September 2011, §12, available online at http://www.govtrack.us/congress/billtext.xpd?bill=h112-1249 (last accessed 9 October 2011).

[8] *Compare* Third-Party Submissions during original examination under the EPC *with* Preissuance Submissions introduced by the AIA (Leahy-Smith America Invents Act, H.R. 1249 (112th Congress, First Session), enacted (President Obama) 16 September 2011, §12, available online at http://www.govtrack.us/congress/billtext.xpd?bill=h112-1249 (last accessed 9 October 2011).

[9] Also, the AIA may live up to its name under historian Turner's views, if one construes historian Turner's view as Americans reinventing themselves.

[10] Also, to paraphrase Turner, the AIA may provide yet another example of America developing progress out of economic and political conditions.

The Pitfalls of Using Open-Source Code

Free or open-source software emerged in the early 1980s as a reaction against the perceived threat posed by proprietary software relying on trade secrets, copyrights and contract law to limit access to source code. The Free Software Foundation (FSF), a pioneer of the open-source code movement, was responsible for developing and releasing several free and open-source software programs, including the Linux operating system kernel. The FSF currently focuses on developing and maintaining various open-source licenses such as the GNU General Public License (GNU GPL), the GNU Lesser General Public License (GNU LGPL) and the GNU Affero General Public License (GNU AGPL). Although each of these licenses has different terms, the central idea is that software released under a GNU license should not ultimately end up locked away as part of proprietary software. In essence, open-source code must always remain "open" or "free" (i.e., accessible and modifiable, even when used as part of subsequent programs that were independently created).

As acknowledged by the founder of the FSF, the terms of the GNU licenses are rather complex and largely specific to relatively low-level system languages such as "C," the typical language of early GNU software and libraries.[1] Nonetheless, GNU licenses have been and continue to be applied to a variety of different software languages. Unfortunately, GNU licenses have rarely been challenged in court.[2] Consequently, there is little judicial precedent to help understand the meaning of the provisions of these license agreements above and beyond the four corners of the agreements themselves and the various documents and FAQs published by the FSF.

Notwithstanding the lack of judicial comment or blessing with respect to the enforceability of the GNU licenses, it is clear that the GNU GPL is the most "copyleft" of the GNU licenses and provides users four freedoms that are generally reserved by copyright law to the copyright holder: the freedom to use the software for any purpose, the freedom to change the software to suit the user's needs, the freedom to share the software with others and the freedom to share the changes made to the software. As such, software licensed under the GNU GPL is said to be "free software." Importantly, "free software" does not mean that developers may not charge a price for the distribution of the software. Instead, the term "free" is in reference to the end user's right to modify and distribute the source code associated with the software.

Today, most open-source code or free software is provided under the GNU GPL. Under the terms of this license, certain uses of open-source code "infect" the final product such that it also becomes open-source and distributed under the GNU GPL.[3] For example, if a programmer improves the Linux kernel and distributes it to others, the programmer is free to "sell" the new kernel on the market so long as the modified kernel is distributed under the GNU GPL (i.e., so long as the source code is available to end users to modify and subsequently redistribute).

Although the open-source movement was designed to combat the development of proprietary software, the restrictive GNU GPL forced several corporate software developers (e.g., Microsoft) away from using open-source code. In response and recognizing that a number of open-source software constitutes software libraries (i.e., collections of resources used to develop software and to provide services to independent programs),[4] the FSF created the weaker GNU LGPL, a license specifically directed to the use of such libraries with fewer copyleft restrictions than the GNU GPL.

The latest version of the GNU LGPL (version 3, dated June 29, 2007), incorporates the entirety of the GNU GPL and adds certain detailed exceptions for "Applications" (e.g., programs that "make use" of an open-source library) and "Combined Works" (e.g., "works produced by combining or linking an application with an open-source library").

[1] Richard E. Fontana, *Open Source License Enforcement and Compliance*, The Computer & Internet Lawyer, Apr. 2010 at *5.

[2] *Kelly v. Sky Angel*, 2010 U.S. Dist. LEXIS 70624 (E.D. Tenn. 2010); *Progress Software Corp. v. MySQL AB*, 195 F. Supp. 2d 328 (D. Mass. 2002); *Computer Assocs. Int'l v. Quest Software, Inc.*, 333 F. Supp. 2d 688 (N.D. Ill. 2004); *Wallace v. Int'l Bus. Machines Corp.*, 467 F.3d 1104 (7th Cir. 2006).

[3] In general, users of software licensed under the GNU GPL may use such software internally without any consequence. Similarly, users of such software may generally convey unmodified open-source software licensed under the GNU GPL to third parties without being forced to release the source code of other proprietary software used in connection with the open-source code.

[4] In computer science, programs statically or dynamically link to libraries using a linker or compiler. Common dynamic libraries are DLL files (i.e., .dll files) in Microsoft Windows or DSO files (i.e., .so files) in Unix-like systems.

Importantly, Applications themselves are not controlled by the GNU LGPL because they do not include and/or are not otherwise combined or linked with open-source code. In other words, programs that are designed to be used with an open-source code library but that are not actually linked with such libraries are not themselves subject to the open-source code GNU LGPL.

In contrast, Section 4 of the GNU LGPL makes clear that use of open-source libraries to create Combined Works is governed by the license. Unlike the GNU GPL, the Combined Work (including the proprietary application portion thereof) need not be licensed as free software under the terms of the "weaker" GNU LGPL. Instead, Section 4 of the GNU LGPL mandates that end users have access to the source code of the open-source code library and permission to modify the library and recombine it with the application.

In particular, the GNU LGPL (a) requires the provision of notice that an open-source code library was used pursuant to the GNU LGPL alongside other copyright notices, if any; (b) requires the provision of a digital copy of the GNU LGPL; (c) requires the conveyance of the source code of the library and the corresponding source code or object code of the application in a form that allows a user to modify the library and recombine or relink it with the application to create a modified Combined Work; and (d) prohibits terms that restrict access and modification to the source code of the open-source library or that otherwise restrict the end users' ability to engage in reverse engineering to debug such modifications. For example, if a programmer uses an open-source code library in a word processing application for the Linux operating system and sells the product to customers, the GNU LGPL requires that the programmer provide customers the opportunity to access, modify and recombine the open-source library with the word processing application. If the library is dynamically linked, the programmer might use a suitable shared library mechanism for linking the object code of the application with the modified library at run time or, if the library is a statically linked library, the programmer would be required to provide either the source code for the application or a linkable object code version of the application.

Legal Issues Associated with Using Open-Source Code

1. Infection of Proprietary Software by Modification of Open-Source Code

Programmers may be tempted to adapt and modify a routine from an open-source code application. Use of such modified open-source code in a distributed product may result in infection of the corresponding source code of the proprietary application used with it, transforming it into open-source code that must be "freely" provided to end users.

2. Lack of Warranty

Generally, open-source code suppliers do not provide legal indemnification against claims for patent infringement or breach of warranties. Instead, open-source code is generally obtained "as is." In the event a third party alleges patent infringement based on the use of open-source code, accused infringers will not likely be able to rely on any indemnification or warranty.

3. Prohibition on use of other Incompatible Open-Source Software

As a condition of use of the open-source library under the GNU GPL, programmers may not impose any further restrictions on the exercise of the rights granted under the GNU GPL. Thus, to the extent a programmer incorporates other open-source software governed by a different open-source software license, the programmer must first ensure that the two open-source software components are "compatible" or subject to certain exceptions. For example, open-source software governed by the 4-Clause Original BSD open-source license, which requires the display of an acknowledgement on all advertising materials, is incompatible with the GNU GPL. Therefore, programmers may not convey programs that include such BSD open-source code with modified open-source software governed by the GNU GPL. In contrast, the Apache License 2.0 is compatible with the GNU GPL, and programmers are free to modify and combine source code governed by the Apache License 2.0 and the GNU GPL.

Accordingly, while use of open-source software may be tempting, it is prudent to consider what trip

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wires and land mines one must successfully traverse before blindly using "free" software.

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Case Law Review

The Importance of Drafting Clear Patent Assignments

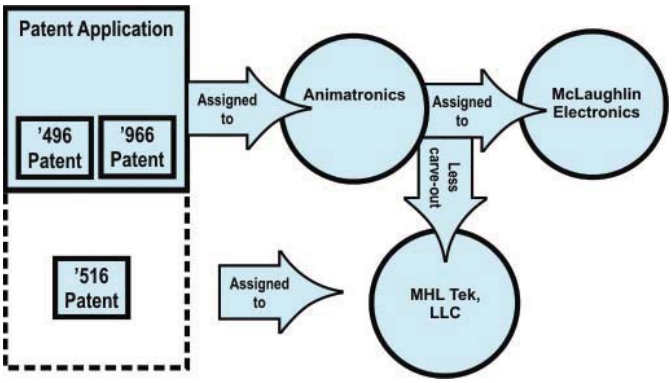
MHL Tek v. Nissan Motor Co.
(Fed. Cir. 2011)

A recent decision of the Federal Circuit highlights the importance of the language of patent assignments. In *MHL Tek, LLC v. Nissan Motor Co.*,[1] the court dismissed all claims of patent infringement by MHL Tek, LLC ("MHL") by finding that MHL lacked standing as a result of the rights transferred in a series of patent assignments. This result highlights the importance of drafting clear patent assignments that transfer those rights, and only those rights, that are intended. Any ambiguity may result in unintended consequences for either the transferor or transferee, or both.

MHL asserted patents that included technology related to tire pressure monitoring systems against a variety of automobile manufacturers. The asserted patents included U.S. Patent Nos. 5,663,496 (the "'496 patent"), 5,741,966 (the "'966 patent"), and 5,731,516 (the "'516 patent"). The '496 patent and the '966 patent are both divisionals of a common parent application (the "Parent Application"). The '516 patent, however, is not related to this family of patents.

A complicated trail of assignments then occurred that ultimately led to the Appeal after the District Court for the Eastern District of Texas dismissed the suit because MHL lacked standing to assert the '496 patent and the '966 patent and granted summary judgment of noninfringement of the '516 patent. The chart below depicts the assignments that ensued after the patents at issue in this suit were filed.

First, the inventors of the '496 patent and the '966 patent executed an assignment in which "[the inventors] do hereby assign, sell, and set over to ANIMATRONICS, INC . . . the entire right, title and interest, domestic and foreign, in and to the inventions and discoveries in [the Parent Application]." Animatronics, Inc. ("Animatronics") subsequently executed an assignment to McLaughlin Electronics of the "entire right, title and



interest, domestic and foreign, in and to the inventions and discoveries set forth in the [Parent] Application," but the assignment also stated that the assignment "shall not cover any rights to the [Parent] Application that concern the Animatronics Proprietary Inventions" (the "carve-out provision").

Second, the inventors signed documents that purported to assign the patents-in-suit to MHL. In addition, Animatronics assigned its interests, if any, in the patents-in-suit to MHL. MHL's claims of infringement were then based on its ownership of the patents-in-suit either from direct assignment by the inventors or from the transfer of Animatronics' rights that Animatronics had retained as a result of the carve-out provision.

The Federal Circuit ultimately held that MHL lacked standing to assert its claim of infringement with respect to any of the three asserted patents. The language of the patent assignments and the subject matter that was related to the language of the patents were the determining factors in the court's decision.

First, MHL argued that it owned rights in the '496 patent and the '966 patent as a result of the transfer of rights in these patents from Animatronics to MHL because the claims asserted in the suit fell into the carve-out provision. The Federal Circuit disagreed.

[1] No. 2010-1287, -1317, -1318 (Fed. Cir. Aug. 10, 2011), available at http://www.cafc.uscourts.gov/images/stories/opinions-orders/10-1287 -1317 -1318.pdf (last accessed 8 November 2011).

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The court looked at the carve-out provision of the assignment documents and determined that the asserted claims were not covered by the carve-out provision. The court then stated that MHL lacked standing to assert the two patents.

Second, MHL sought to assert the '516 patent because, MHL argued, the '516 patent was not assigned with the other two asserted patents. Here, the court looked to the language of the initial assignment from the inventors to Animatronics. The assignment transferred all rights and interest "in and to the inventions and discoveries set forth in the [Parent] Application." MHL argued that the '516 patent was not transferred because it is not related to the Parent Application. The Federal Circuit disagreed. The court stated that if the claims of the '516 patent were supported by the specification of the Parent Application, then the patent assignment transferred those rights to Animatronics and then subsequently to McLaughlin Electronics. After a review of the specification, the court found that the specification did indeed support the claims of the '516 patent, and the rights were therefore transferred.

With no valid interest in the asserted patents, MHL's claims of patent infringement were dismissed. This result highlights the importance of drafting clear patent assignments that transfer those rights, and only those rights, that are intended. Any ambiguity may result in unintended consequences for either the transferor or transferee, or both.

If you have any questions about this article, please contact **John Munro** at +1 (312) 609 7788. ■

Practice Tips:

1. Always carefully draft and review technology transfers to determine the boundaries of the rights transferred
2. When purchasing rights in technology, always review prior transfers to ensure you are receiving the rights and value that you believe you are receiving
3. When a transfer of less than all the rights in a patent is made, carefully determine and define those rights

Flowchart Inadequate Structure to Define a Computer-Implemented Means-Plus-Function Limitation

In re Aoyama
(Fed. Cir. 2011)

A flowchart alone is an insufficient structure to define a computer-implemented means-plus-function claim limitation under 35 U.S.C. § 112, ¶ 2, according to the Federal Circuit. It is advisable to include figures and a corresponding discussion demonstrating the components of a computer that may be used to carry out the steps of a process that is claimed in means-plus-function format.

Mitsui Bussan Logistics, Inc. ("Mitsui") is the assignee of U.S. Patent Application No. 10/898,505 (the "'505 Application") directed to a "System and Method for Distribution Chain Management." During prosecution, the Examiner rejected the claims in the '505 Application as anticipated by U.S. Patent Application Publication No. 2001/0034673 to Yang et al. ("Yang"). Mitsui appealed this rejection to the Board of Patent Appeals and Interferences (the "Board"), which affirmed the Examiner's rejection. Mitsui then appealed the Board's ruling to the U.S. Court of Appeals for the Federal Circuit.

Independent claims 11 and 21 were pending upon appeal. Independent claim 11 recited (with the disputed limitation italicized):

> 11. A system for supply chain management comprising:
>
> an order controller system including *reverse logistics means for generating transfer data*; and
>
> a warehouse system receiving the transfer data and generating shipping data.

Claim 21 similarly contained the limitation "reverse logistics means for . . . generating transfer data."

Importantly, the Examiner construed the "reverse logistics means for generating transfer data" limitation as a means-plus-function limitation under 35 U.S.C. § 112, ¶ 6. Under § 112, ¶ 6, the scope of protection afforded to a means-plus-function limitation is limited to the specific structure(s) disclosed in the specification and equivalents

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thereof.[1] Accordingly, the first issue that the Federal Circuit addressed was whether the Board correctly identified the structure in the specification corresponding to the "reverse logistics means for generating transfer data" limitation.

The court began this analysis by noting that "structure disclosed in the specification is corresponding structure only if the specification or prosecution history clearly links or associates that structure to the function recited in the claim."[2] In determining that the Board erred by identifying structure that was not clearly linked or associated by the specification or prosecution history with the function actually recited in the claim (i.e., "generating transfer data"), the court noted that Figure 8 and the corresponding discussion within the specification reflected the only portion of the specification linked to the function at issue. The flowchart of Figure 8 is shown below.

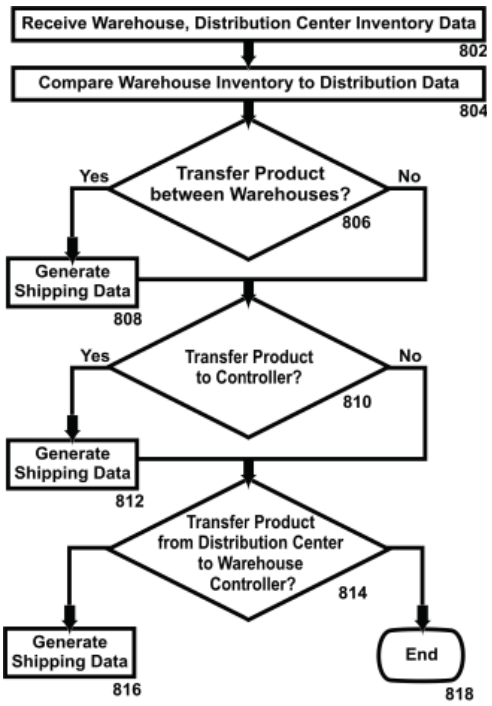

Figure 8 800

Having settled on the correct structure corresponding to the limitation at issue, the Federal Circuit turned to whether the identified structure was sufficient to satisfy § 112, ¶ 6. Specifically, the Court addressed the issue of whether the particular flowchart of Figure 8 and the accompanying description in the specification provided adequate structure to satisfy § 112, ¶ 6. As to this issue, the Federal Circuit agreed with the Board's determination that Figure 8 failed to describe how a computer could be programmed to produce the structure that provides the results described in the boxes. Thus, the lack of discussion within the specification as to how a computer could actually perform the steps depicted in Figure 8 appears to have been fatal for claims 11 and 21.

Having determined that the "reverse logistics means for generating transfer data" limitation of claims 11 and 21 lacked sufficient disclosure of structure under § 112, ¶ 6, the Court held these claims to be unpatentable as indefinite under 35 U.S.C. § 112, ¶ 2. That is, the Court concluded that claims 11 and 21 were unpatentable, not for being anticipated by Yang as determined by the Board, but rather due to their indefiniteness.[3]

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[1] 35 U.S.C. § 112, ¶ 6 (a claim limitation expressed in means-plus-function language "shall be construed to cover the corresponding structure described in the specification and equivalents thereof").

[2] *Med. Instrumentation & Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1210 (Fed. Cir. 2003).

[3] *See Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1332 (Fed. Cir. 2010) ("If a claim is indefinite, the claim, by definition, cannot be construed . . . [and] [w]ithout a discernable claim construction, an anticipation analysis cannot be performed.").

Practice Tip:

While means-plus-function limitations may serve as a valuable tool for broadly defining computer-implemented processes (e.g., software), it is crucial that the specification describe adequate structure to define these limitations. Specifically, it is advisable to include figures and a corresponding discussion demonstrating the components of a computer that may be used to carry out the steps of a process that is claimed in means-plus-function format. Proceeding in this manner will strengthen the claims against any attacks under 35 U.S.C. § 112, ¶ 2 and/or 35 U.S.C. § 112, ¶ 6. Vedder Price patent attorneys can assist in preparing patent applications directed to computer-implemented processes that will survive patentability challenges under 35 U.S.C. § 112, ¶ 2 and/or 35 U.S.C. § 112, ¶ 6.

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