

Ericsson v. TCL Lays Bare the Federal Circuit's Fundamental Hostility to Patents



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“The Federal Circuit refuses to define the term “abstract idea,” so there is no way to know how Chief Judge Prost and Judge Chen are defining the term, or even if their definition of the term is the same when compared to each other, let alone to the rest of the Federal Circuit.”



It has become difficult to understand why the Federal Circuit does what it does in any number of rulings, but its decisions relating to patent eligibility have set patent law back several generations, turned precedent on its head, ignored the Patent Act passed by Congress, and unnecessarily and inexplicably expanded upon bad Supreme Court precedent. Somewhere along the way, the Federal Circuit lost its footing in a spectacularly demoralizing fashion. Patents must be stopped at all costs—or so they seem to believe—and 35 U.S.C. 101 is the tool *du jour*.

Kill at All Costs

Nowhere is the intellectual perversion more obvious than in [*Ericsson, Inc. v TCL Communication Technology Holdings Limited*](#), No. 2018-2003 (Decided April 14, 2020). In this decision, not only did a split Federal Circuit panel (with Judge Newman in dissent) find Ericsson’s claims patent ineligible despite the claims being “written in technical jargon”, but the panel also allowed the defendant to appeal a non-final order in violation of Fifth Circuit law, and allowed the defendant to raise the issue of ineligibility despite it not being properly preserved under Fifth Circuit law.

Judge Newman explained in dissent:

Contrary to the panel majority's theory, the Section 101 issue was not preserved for appeal. The Fifth Circuit is explicit that an "interlocutory order denying summary judgment is not to be reviewed," even after "full trial on the merits" and even for "purely legal issues," unless "it is sufficiently preserved in a Rule 50 motion." Feld Motor Sports, Inc. v. Traxxas, L.P., 861 F.3d 591, 595–96 & n.4 (5th Cir. 2017); Puga v. RCX Sols., Inc., 922 F.3d 285, 291 n.2 (5th Cir. 2019). The Fifth Circuit stresses that appellate review is available only for issues preserved in a Rule 50 motion. Feld, 861 F.3d at 596.

Other circuits are in accord. See, e.g., Ji v. Bose Corp., 626 F.3d 116, 127 (1st Cir. 2010) (a party "must restate its objection" in order "to preserve its challenge for appeal"); Elm Ridge Expl. Co., LLC v. Engle, 721 F.3d 1199, 1219 (10th Cir. 2013) (a party cannot appeal the denial of its Rule 50 motion "when it did not renew the motion under Rule 50(b) after the jury's verdict"); Duban v. Waverly Sales Co., 760 F.3d 832, 835 (8th Cir. 2014) ("Litigants must renew summary judgment arguments in Rule 50 motions to preserve their arguments for appeal."); Luxottica Grp., S.p.A. v. Airport Mini Mall, LLC, 932 F.3d 1303, 1310 n.1 (11th Cir. 2019) ("[T]he only way to preserve a Rule 50(a) motion is to renew it under Rule 50(b)."). Although courts have allowed a few departures in extraordinary circumstances, the case at bar is not asserted to present extraordinary circumstances.

So, "the Federal Circuit set aside the Federal Rules and sound practice for civil trials and appeals, and holds that the district court's pre-trial denial of a motion for summary judgment based on 35 U.S.C. § 101 is the same as a final decision in favor of the non-movant," wrote Judge Newman. Obviously, the Ericsson patent had to be killed at all costs.

Defining in the Abstract

Basic logic be damned, Chief Judge Sharon Prost *actually* wrote that the claims at issue were directed to an abstract idea even after begrudgingly admitting that the claims were written in technical jargon. "Although written in technical jargon, a close analysis of the claims reveals that they require nothing more than this

abstract idea,” Prost wrote, and was joined by Judge Chen. Isn’t technical jargon precisely how one is supposed to define a technical solution to a technical problem?

Claim 1 reads:

1.

1. A system for controlling access to a platform, the system comprising:

a platform having a software services component and an interface component, the interface component having at least one interface for providing access to the software services component for enabling application domain software to be installed, loaded, and run in the platform;

an access controller for controlling access to the software services component by a requesting application domain software via the at least one interface, the access controller comprising:

an interception module for receiving a request from the requesting application domain software to access the software services component;

and a decision entity for determining if the request should be granted wherein the decision entity is a security access manager, the security access manager holding access and permission policies; and

wherein the requesting application domain software is granted access to the software services component via the at least one interface if the request is granted.

Even a cursory review of claim 1 reveals that the claim is most certainly not directed to an abstract idea. The system for controlling access to a platform includes an interface, an access controller, an interception module and a decision entity. Of course, those who are predisposed, like Judges Prost and Chen, to believing this claim is abstract will be unconvinced, and no amount of argument or evidence could ever convince them they are wrong. Why? Because the Federal

Circuit refuses to define the term “abstract idea,” so there is no way to know how Chief Judge Prost and Judge Chen are defining the term, or even if their definition of the term is the same when compared to each other, let alone to the rest of the Federal Circuit.

Of course, if you actually look up the [definition of “abstract idea”](#) and apply the plain and ordinary meaning of the term, as is appropriate for undefined terms, see [Phillips v. AWH Corp.](#), 415 F.3d 1303 (Fed. Cir. 2005) (*en banc*), you find that the term means “thought of apart from concrete realities, specific objects, or actual instances; expressing a quality or characteristic apart from any specific object or instance”. Clearly, under the ordinary plain meaning of the term, the Ericsson claim, which has concrete and tangible components that are defined and described in the specification, does not qualify as being or constituting an abstract idea.

Looking at the Law

The rest of the Federal Circuit decision is, well, stupefying.

The panel majority writes:

We are mindful that the step one inquiry looks to the claim’s ‘character as a whole’ rather than evaluating each claim limitation in a vacuum.

But then they proceed to dissect the claim elements nevertheless:

This recitation of functional computer components does not specify how the claim ‘control[s] access to a platform,’ nor does it direct the claim to anything other than that abstract idea.” The panel then later writes: “Ericsson does not deny that its claims are drafted functionally... The claims are silent as to how access is controlled. They merely make generic functional recitations that requests are made and then granted.

The claims, according to both Ericsson and the Federal Circuit, are written functionally. So, why then does the panel protest when Ericsson argues that the

specification provides detail that needs to be considered in order to fully understand and interpret the claims? That is the entire point of using functional language in a claim.

The panel wrote:

Ericsson misstates the role of the specification, which ‘cannot be used to import details from the specification if those details are not claimed.’ ChargePoint, 920 F.3d at 769. Rather, ‘any reliance on the specification in the § 101 analysis must always yield to the claim language.’

It wasn't Ericsson who misstated the role of the specification! It was the panel. When functional claiming is employed, one must “determine whether the specification discloses sufficient structure that corresponds to the claimed function.” See [Williamson v. Citrix Online, LLC](#), 792 F.3d 1339, 1351 (Fed. Cir. 2015). So, the Federal Circuit fell prey to the most common of litigation mistakes.

There is a VERY big different between an absolute prohibition on the specification reading limitations into the claims and what the law actually says. Patent law prohibits the impermissible reading of limitations into the claims. By its very wording, the rule must allow some reading from the specification into the claims, and it does. The specification is to be the dictionary or glossary for the claims, so if you define a term or concept in the specification, that absolutely is imported into the claims. See [Dayco Products, Inc. v. Total Containment, Inc.](#), 258 F.3d 1317 (Fed. Cir. 2001) (“Our cases make clear, however, that adding limitations to claims not required by the claim terms themselves, or unambiguously required by the specification or prosecution history, is impermissible.”). So, if the specification unambiguously requires the importation of a definition, for example, the importation would not be impermissible. See [Laitram Corp. v. NEC Corp.](#), 163 F.3d 1342 (1998)(prohibiting the importation because the term from the specification was different and broader than the term used in the claim).

Moreover, if you use functional claiming, as Ericsson admitted and the Federal Circuit acknowledged, the functional terms are interpreted to cover the full extent of the technological disclosure in the specification. *See Williamson* at 1352. So, Ericsson was correct and the panel was incorrect, unless of course the panel is overruling many hundreds, perhaps thousands, of cases on claim interpretation relating to functional limitations and the proper use of the specification to impart meaning to claims.

Fundamental Hostility

This all happens because the Federal Circuit has shown an enormous allergy toward doing the right and sensible thing, which is to require a full-blown claim construction prior to determining whether a claim is patent eligible.

It is interesting to point out that Prost and Chen are dead wrong with respect to the role the specification should have played in this analysis, but the two-part *Alice-Mayo* framework is a review of a claim in order to determine whether it is abstract and sufficiently novel. How that can be done without considering prior art is an issue for another day, but how can one know what the claim covers with only the cursory 101 review done today? Black letter patent law absolutely requires consultation and review of the specification, prosecution history and claims before determining what a claim actually covers. [*Markman v. Westview Instruments, Inc.*](#), 52 F.3d 967, 977-80 (Fed. Cir. 1995) (*en banc*), *aff'd*, 517 U.S. 370 (1996).

Something is severely wrong with the Federal Circuit. At a time when innovation will be critical for both the economy and national security, how much longer can we continue with the nation's top patent court being so fundamentally hostile to patents?