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PROCEDURES FOR CLAIM CONSTRUCTION AFTER *Markman*

*George Summerfield and Todd Parkhurst**

I. INTRODUCTION

In patent litigation, no issue commands as much attention, nor causes as much difficulty, as the construction of terms contained in a patent's claim. Since the United States Supreme Court issued its decision in *Markman v. Westview, Inc.*,[1] it has fallen exclusively upon the courts, as opposed to juries, to undertake that exercise of claim construction. Although the Supreme Court made it clear that claim construction is an issue for the courts, it gave no guidance as to how and when the courts should do so. Rather, the Supreme Court left it to the various district courts to determine the procedure and the timing for interpreting claim language.

The district courts have, over the last several years, wrestled with the particular methods by which patent claims should be construed. No consistency has emerged. Often, district courts, unaware of the specific implications of *Markman*, treat the procedure for construing claims as an afterthought. However, district courts usually welcome input from the litigants regarding the appropriate procedure for construing claims. It is, therefore, important for both the plaintiff and the defendant in any patent infringement suit to have thought through the desired procedure for claim construction, which can be proposed either jointly or separately to the district court.

This Article discusses the benefits and drawbacks of the various procedures that courts have used to construe patent claims. Parties to patent infringement litigation may propose one or more of these procedures during the course of litigation to exercise some control over the manner and timing of claim construction.

II. DISCUSSION

A. What Did Markman *Actually Decide?*

In a rare grant of certiorari in a patent case, the United States Supreme Court decided to review the en banc decision rendered by the United States Court of Appeals for the Federal Circuit in *Markman v. Westview Instruments, Inc.*[2] An issue facing the circuit court in *Markman* was the proper role of the jury in a patent infringement suit. The circuit court wrestled with the specific question of whether the judge, as opposed to the jury, should construe the disputed terms of a patent claim. In affirming the district court's finding of infringement, the court found that it was for the court to construe patent claims as a matter of law.[3] Specifically, the circuit court stated that "in a case tried to a jury, the court has

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1. 517 U.S. 370 (1996).
2. 52 F.3d 967 (Fed. Cir. 1995) (en banc).
3. *Id.* at 979.

the power *and obligation* to construe as a matter of law the meaning of language used in the patent claim."[4]

The United States Court of Appeals for the Federal Circuit also examined the types of evidence that should be used in construing claims. This court stated principally that "[t]o ascertain the meaning of claims, we consider three sources: the claims, the specification, and the prosecution history."[5] The circuit court, however, acknowledged that evidence extrinsic to the patent may be helpful in construing the patent's claims. "Extrinsic evidence consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises. This evidence may be helpful to explain scientific principles, the meaning of technical terms, and terms of art that appear in the patent and prosecution history."[6]

The Supreme Court granted certiorari to review the Federal Circuit's determination. During the appeal, several third parties filed amicus briefs, urging the Supreme Court to eliminate the role of the jury completely in patent infringement cases. Although the Supreme Court did not go so far as to eliminate juries, it did affirm the Federal Circuit's decision making claim construction the exclusive province of the court.[7] The result is that, in resolving the issue of infringement, the judge is to instruct the jury as to the proper meaning of the asserted claim, while the jury is to determine whether the claim, as construed by the court, literally covers the thing accused.[8]

The Supreme Court dealt very little with the issue of the evidence that a court should use in construing a patent claim.[9] However, the Court did suggest that expert opinion is one category of evidence that a court may consider.[10]

Since *Markman*, the Federal Circuit has rendered opinions that discuss the types of evidence that courts should consider in construing patent claims.[11] However, the Federal Circuit has never provided any guidelines to the district courts regarding how and when issues of claim construction should be resolved. Rather, the Federal Circuit has left it to the various district courts to determine the appropriate procedural manner in which to construe claims. The result so far has been claim construction procedures that vary from district to district, from judge to judge within a particular district, and from case to case for particular judges.

B. Summary Judgment Pursuant to FED. R. CIV. P. *56*

Federal Rules of Civil Procedure 56 states that summary judgment shall be granted if "there is no genuine issue as to any material fact and the moving party

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4. *Id.* (emphasis added).
5. *Id.* (citing Unique Concepts, Inc. v. Brown, 939 F.2d 1558, 1561 (Fed. Cir. 1991)).
6. *Id.* at 980.
7. Markman v. Westview, Inc., 517 U.S. 370, 372 (1996).
8. *Id.*
9. *Id.*
10. *Id.*
11. *See, e.g.*, Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448 (Fed. Cir. 1998) (en banc); Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576 (Fed. Cir. 1996).

is entitled to a judgment as a matter of law."[12] It has long been the law that summary judgment is as appropriate in a patent case as in any other matter.[13] Claim construction, being an issue of law, is especially amenable to resolution by summary judgment, because no factual disputes are involved.

Further, the Federal Circuit has stated that a court should construe a patent's claims by first considering the evidence intrinsic to the patent, i.e., the claims themselves, the specification, and, when in evidence, the prosecution history.[14] When the intrinsic evidence resolves a dispute regarding the meaning of a claim limitation, it is improper to rely upon extrinsic evidence, e.g., expert opinions, to construe that limitation.[15] Some subsequent Federal Circuit decisions have backed away from, but have not overruled, this seeming prohibition against the use of extrinsic evidence in construing otherwise unambiguous claim terms.[16] Nonetheless, it is clear that a patent's intrinsic evidence is enormously important in construing claims.

Given these circumstances, construction of unambiguous claims may be resolved by a motion for summary judgment relying only upon evidence intrinsic to the patents in suit. In other words, the moving party need not, and perhaps should not, provide expert affidavits and deposition testimony regarding the meaning of claim terms. In the event that the non-moving party disputes the moving party's claim construction, such a dispute would be legal in nature, and can be resolved by the court on summary judgment.[17] As there is often little dispute between the parties regarding the nature of the thing accused, summary judgment regarding claim construction often resolves the issue of infringement in its entirety.

The main obstacle to summary judgment on the issue of claim construction is the unwillingness of non-moving parties to draw the appropriate line between claim coverage—meaning of the claim—and claim construction, or, in other words, whether the claims, as properly defined, read on the thing accused. Most district court judges have insufficient experience in post-*Markman* claim construction to draw that line themselves. The courts will, therefore, rely to a great extent on the parties' arguments to determine where claim construction ends and claim coverage begins.

An example of this problem occurs when patent claims contain terms such as "about" or "approximately." For example, a claim for an alloy may contain as a limitation iron in an amount of "about" thirty to about forty-five weight percent. The district court can, on the one hand, construe the term "about" specifically as meaning plus or minus two percent, which inevitably allows the court to resolve on summary judgment the question of whether iron is found in the accused alloy in an amount between twenty-eight and forty-seven weight percent.

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12. FED. R. CIV. P. 56.

13. *See, e.g.*, Kegel Co. v. AMF Bowling, Inc., 127 F.3d 1420, 1425 (Fed. Cir. 1997); Serrano v. Telular Corp., 111 F.3d 1578, 1581 (Fed. Cir. 1997).

14. *Vitronics*, 90 F.3d at 1582.

15. *Id.*

16. *See, e.g.*, Fromson v. Anitec Printing Plates, Inc., 132 F.3d 1437, 1444 (Fed. Cir. 1997).

17. *See* Nagle Indus., Inc., v. Ford Motor Co., Civ. No. 95-75840, Opinion and Order (E.D. Mich. Mar. 13, 1997), *aff'd*, 194 F.3d 1339 (Fed. Cir. 1999).

On the other hand, the district court can construe the term "about" as meaning "around," leaving to the jury the inevitable fact question of whether an iron content of, for example, twenty-eight weight percent in an accused alloy is "around" thirty weight percent. Not surprisingly, a non-moving party will often urge the district court on summary judgment to take the latter approach to claim construction.

Non-moving parties will also frequently assert the need at a minimum to conduct expert discovery in order to develop evidence necessary to the issue of claim construction. Recent Federal Circuit Court decisions contain language to the effect that expert opinions may be useful to the court at least as background information for the technology in suit.[18] As a practical matter, parties to patent infringement suits feel compelled to take the depositions of the inventors, the prosecuting attorneys, and the technical experts regarding the meaning of claims, notwithstanding the Federal Circuit's decision in *Vitronics v. Conceptronic, Inc.*[19] The other party may object to producing such extrinsic evidence in light of *Vitronics*. However, that party cannot then itself expect to rely upon extrinsic evidence to urge a particular construction.[20] In any event, at least one court has ruled that contention interrogatories, as opposed to party depositions, are the most appropriate way to obtain discovery on the issue of claim construction.[21]

Despite its various obstacles, and given the Supreme Court's decision in *Markman*, summary judgment on the issue of claim construction based solely on intrinsic evidence is the best opportunity for an early resolution to a patent infringement suit without incurring significant costs for discovery. As district court judges become more familiar with the mechanics of claim construction, summary judgment motions on that issue will likely enjoy increasing success.

C. Markman *Hearings*

To the extent a court is unwilling for whatever reason to resolve issues of claim construction on a motion for summary judgment, the next course of action available to the parties is a *Markman* hearing in which the court receives argument and/or evidence regarding the proper construction of patent claims. Although there is no procedure specified for a *Markman* hearing in the Federal Rules of Civil Procedure, at least one court, the Northern District of California, has promulgated its own local rules regarding procedure for construing claims.[22] These rules set forth a detailed procedure for the exchange of information between the parties on the issue of claim construction and for briefing that issue in advance of a hearing on claim construction.[23] The Northern District of Illinois also has evaluated two sets of draft rules on claim construction, but has not adopted them.

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18. *See Fromson*, 132 F.3d at 1444.
19. *Vitronics*, 90 F.3d 1576.
20. Zip Dee Inc. v. Dometic Corp., 63 F. Supp. 2d 868, 869-70 (N.D. Ill. 1998).
21. Exxon Research and Eng'g Co. v. United States, 44 Fed. Cl. 597, 600 (Fed. Cl. 1999).
22. *See* N.D. CAL. R. 16-10.
23. *Id.*

Certain judges have, as part of their scheduling orders in patent infringement cases, included a provision for a hearing on claim construction. For example, Judge McKelvie in the Federal District Court of Delaware schedules claim construction hearings several weeks before the commencement of trial.[24] In the absence of local rules or a scheduling order providing for a *Markman* hearing, it is up to the litigants to propose such a hearing to the court. Frequently, courts will hold such hearings, and will afterwards issue a decision on claim construction.[25]

The question is not so much whether a court will hold a *Markman* hearing—as most will—but what format such a hearing will employ. One option is that the court simply hears argument from the attorneys regarding the content of the intrinsic evidence. Those judges who adhere strictly to the holding in *Vitronics* are likely to select such a format. This option should be the most attractive to the litigants, as it generally involves the least amount of effort and time. It also eliminates the need to conduct discovery on alternative theories that differ as to a particular claim limitation's meaning. Once the court has determined the meaning of the subject claims, discovery on the ultimate issue of infringement, validity, and enforceability can proceed in light of that determination.

Another option is that the court receives the opinions of technical experts on the background of the subject technology. Presumably, these opinions become more important as the complexity of the technology involved in the suits increases. Such opinions are contemplated in more recent decisions of the Federal Circuit, such as *Fromson v. Anitec Printing Plates, Inc.*[26] and *Cybor Corp. v. FAS Technologies, Inc.*[27] Such opinions are even discussed as a possibility in the Supreme Court's decision in *Markman*.

Finally, the court can opt for an evidentiary hearing limited only by the Federal Rules of Evidence. At such a hearing, any otherwise unobjectionable extrinsic evidence, including live witness testimony, may be introduced to persuade the court that a particular claim construction is correct. This final option inevitably requires significant preparation in advance of such a hearing, and is therefore the least attractive option in terms of expediency.

Generally speaking, a *Markman* hearing should resolve the infringement issue in a case. However, if a party so chooses, it can amend its infringement claim after the court has held a *Markman* hearing and construed the claims.[28]

D. The Use of Special Masters

Of the hundreds of judges at the district court level, very few have technical training or significant experience in patent law. Further, very few have the time

24. *See, e.g.*, LNP Eng'g Plastics, Inc. v. Miller Waste Mills, Inc., Civ. No. 96-462 (RRM), Scheduling Order at 3 (D. Del. Feb. 4, 1998).

25. *See, e.g.*, Middleton, Inc. v. Minnesota Mining and Mfg. Co., Civ. No. 96-C-6781, *Markman* Ruling and Order (N.D. Ill. Feb. 9, 1998), *aff'd*, 1999 U.S. App. LEXIS 29872 (Fed. Cir. Nov. 16, 1999).

26. Fromson v. Anitec Printing Plates, Inc., 132 F.3d 1437, 1444 (Fed. Cir. 1997).

27. Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1454-55 (Fed. Cir. 1998) (en banc).

28. Becton Dickinson & Co. v. Syntron Bioresearch, Inc., 51 U.S.P.Q.2d 1722, 1735 (S.D. Cal. 1998).

or the inclination to become acclimated in the subject technology, especially where the technology is complicated. As an alternative, special masters, with expertise in the particular technology at issue in patent infringement cases may be employed to resolve issues of claim construction.[29] Preferably, the parties can jointly move for the appointment of a special master, although courts have occasionally appointed special masters upon an opposed motion. Special masters need not be judges or magistrates, and need not even be lawyers. Rather, a proposed special master need be acceptable only to the parties and the court. Generally, it is the technical expertise of a particular individual that makes him attractive as a special master.

Although the parties may contract to make the ruling of a special master binding, most often a special master will make a recommendation to the presiding district court judge that is then adopted, modified, or rejected by the judge. As a practical matter, judges will typically not significantly modify the recommendation of a special master on technical issues.

The appointment of a special master to resolve issues of claim construction does not necessarily obviate the need to conduct discovery on those issues. If the special master concludes that more than the intrinsic evidence is necessary to construe the subject claims properly, then the parties will inevitably need to conduct discovery to develop that evidence. If, on the other hand, the special master finds the intrinsic evidence sufficient for claim construction, little, if any, discovery on that issue will be required. In any event, the use of a special master does not necessarily mean that there will be less effort and expense in discovery. Rather, there is a greater likelihood that a special master will expend the effort necessary to construe difficult claims properly.

E. Court-Appointed Experts

Federal Rule of Evidence 706 allows for court-appointed experts to participate in a proceeding as directed by the judge.[30] A Rule 706 expert does not take the place of the judge. Rather, the expert can hear evidence, review position papers of the parties, and make recommendations to the judge as to the proper position on the issues in the case, including claim construction.[31] Some federal judges have told the authors of this Article that they are not inclined to appoint special masters to construe claims because: (1) the individuals nominated to act as special masters usually have no training or experience in the process of judicial decision-making; and (2) the appointing judge must review the special master's decision de novo, so no time or effort is saved by appointing a special master.

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29. *See, e.g.*, Research Corp. Techs., Inc. v. Hewlett-Packard Co., No. CV 95-490 TUC JMR, Report and Recommendation (D. Ariz. Oct. 15, 1998).

30. FED. R. EVID. 706.

31. *See, e.g.*, NEC Corp. v. Hyundai Elecs. Indus. Co., 30 F. Supp. 2d 546 (E.D. Va. 1998).

One possible way to overcome these objections is for the court-appointed expert to listen along with the judge to evidence on claim construction in a *Markman* hearing. The expert can give his opinions on those issues either in the form of direct testimony elicited by the court, or in a written report published to the court and the parties. The parties should then have the ability to bring errors in the opinions to the attention of the court. If the expert's opinion is given in the form of direct testimony, the parties may cross-examine the expert. If the opinion is in the form of a written report, the parties may submit written comments on the substance of the report.

There is a related problem when the court-appointed expert is involved in a jury trial, as may occur if the *Markman* hearing is not held until the jury trial has begun. An expert bearing the imprimatur of the court who gives his opinion on the technical issues will undoubtedly overshadow every other piece of evidence in the minds of the jury.

A competent court-appointed expert is beneficial in circumstances where a case turns on complicated technical arguments. A court-appointed expert is more likely to understand such arguments than the judge or jury. If the expert adopts those arguments in his opinion, the party asserting such arguments is likely to carry the day, regardless of whether the judge and jury understand the arguments. Otherwise, the party must try his luck making such complicated arguments directly to the judge and/or jury.

F. The Parties' Experts

Federal Rule of Evidence 702 contemplates that expert opinions that would be helpful to the "trier of fact" will be received in evidence.[32] The extent to which a court will apply Rule 702 to the issue of claim construction depends upon how the court reads *Vitronics* and its progeny. Further, as claim construction is a legal issue, it would not be dealt with by the "trier of fact." Therefore, it is unclear whether Rule 702 can apply to claim construction.

Additionally, parties are frequently mystified as to whether opinions on claim construction, to the extent allowed, should be rendered by a technical expert or a patent law expert. Claim construction is determined from the vantage point of one skilled in the art.[33] The United States Court of Appeals for the Federal Circuit has made it clear that opinions on claim construction that are not from the vantage point of one skilled in the art are conclusory and cannot be considered as a matter of law.[34]

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32. FED. R. EVID. 702

33. Haynes Int'l Inc. v. Jessop Steel Co., 8 F.3d 1573, 1578 n.4 (Fed. Cir. 1993) (citing Smithkline Diagnostics v. Helena Lab. Corp., 859 F.2d 878, 882 (Fed. Cir. 1988)). *See also* Hoganas AB v. Dresser Indus., Inc., 9 F.3d 948, 951 (Fed. Cir. 1993).

34. Southwall Techs., Inc. v. Cardinal IG Co., 54 F.3d 1570, 1577-78 (Fed. Cir. 1995).

More specifically, the Federal Circuit has openly criticized testimony by patent attorneys on the issue of claim construction as amounting "to no more than legal opinion," and as co-opting the "process of construction that the Court must undertake."[35] The Federal Circuit has consequently held that such testimony "is entitled to no deference."[36] Therefore, unless the patent law expert also qualifies as an expert in the particular technology in suit, he should not opine on the issue of claim construction.

Since 1993 the Federal Rules of Civil Procedure have required that experts submit fairly detailed reports setting forth the opinions that are to be given at trial and the bases therefor.[37] Thus, if an expert is to render an opinion on the ultimate issues of infringement and validity, he will need to discuss the claim construction that he believes to be correct as a part of his analyses of those issues. This is a particular difficulty for a party proffering an expert's opinion that takes the position that expert opinions on the issue of claim construction are inappropriate. A relatively safe approach to this problem is to have the expert state that he has been instructed as to the proper meaning of the subject claims, but offers no opinion on the propriety of such meaning. The infringement opinion, i.e., claim coverage, is then based upon that meaning.

G. Tutorials

Courts seem to be generally willing to entertain tutorials on complicated technology. The purpose of the tutorial is not necessarily to set forth the parties' positions on the subject technological issues in the case. Rather, the tutorial is intended to provide the judge with background information on the subject technology. The judge can use this information to assist in construing the subject claims.

As with *Markman* hearings, there is little guidance from district to district as to how such tutorials are to be conducted. Some judges may have ideas about a useful format for a tutorial, but it is more likely that a particular judge has little exposure to tutorials. Once again, it will be up to the parties in those circumstances to suggest a format to the judge. One possible format involves presentations in narrative form by the respective parties' technical experts. These presentations may involve demonstrative exhibits, such as charts, animations, or multimedia presentations.

From a procedural standpoint, it is unclear as to whether the information provided in a tutorial is evidence within the meaning of the Federal Rules of Evidence. Generally speaking, one would not require an expert to take the normal oath before making his presentation. One would also not expect the parties to object on evidentiary or procedural grounds during a presentation. Finally, tutorial information given in narrative form is inconsistent with the notion of eliciting testimonial evidence through direct and cross-examination. Therefore,

35. Markman v. Westview, Inc., 52 F.3d 967, 983 (Fed. Cir. 1995) (en banc).
36. *Id.*
37. FED. R. CIV. P. 26(a)(2)(B).

the normal safeguards for the admission of reliable "evidence" given in a tutorial are not present. On the other hand, if the court conducts a tutorial as an evidentiary hearing, these procedural concerns no longer exist.

It is reasonably clear from recent decisions that the United States Court of Appeals for the Federal Circuit is not particularly interested in the "evidence" versus the "non-evidence" distinction relating to the construction of claims. Rather, the Federal Circuit is interested in district courts reaching the correct result on the issue of claim construction, regardless of the means used to reach that result. The Federal Circuit is highly unlikely to disturb a district court decision on claim construction that contains the right result, even if the underlying reasons for the holding are questionable. Therefore, courts and parties may employ tutorials where appropriate without being concerned about whether the tutorials adhere to the Federal Rules of Evidence or the Federal Rules of Civil Procedure.

H. Jury Instruction

Once the judge has construed the claims, in jury trials it is still necessary to inform the jury about that construction so that it may render a verdict on the issue of infringement. The simplest means for informing the jury about claim construction is a jury instruction directed to the specific construction arrived at by the judge.[38] It is, in fact, desirable to include an instruction on claim construction in the preliminary charges read to the jury at the beginning of the trial, in addition to an instruction read at the close of the trial. A variation of the preliminary charge approach is to provide the jury with a glossary of terms that includes a definition of the claim terms construed by the judge.[39] Whether the jury is charged regarding the meaning of claim terms before or after the trial, if claim construction is to be part of the charge to the jury, either party may use the judge's definition of terms throughout the trial.

I. Interlocutory Appeal

The United States Court of Appeals for the Federal Circuit has recently made it clear that it reviews a district court's legal determination on claim construction de novo, "including any allegedly fact-based questions" relating thereto.[40] Given this and other pronouncements on claim construction, many practitioners, including the authors, believe that any claim construction is essentially meaningless until the Federal Circuit has set forth its own determination as to what the claims mean.

In the event that the district court resolves the issue of claim construction in advance of the other issues in the suit, it would be logical to request an interlocutory appeal to the Federal Circuit to resolve the issue of claim construction. This

38. LNP Eng'g Plastics, Inc. v. Miller Waste Mills, Inc., C.A. No. 96-462 (RRM), Jury Instructions at 23.
39. *Id.* Glossary of Technical Terms.
40. Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1456 (Fed. Cir. 1998) (en banc).

requires the district court, in the first instance, to state in its ruling that claim construction "involves a controlling question of law as to which there is substantial grounds for difference of opinion," and that the immediate appeal on the issue of claim construction "may materially advance the ultimate termination of the litigation."[41] Thereafter, it is within the discretion of the Federal Circuit as to whether to take the appeal on claim construction in advance of a final judgment.

Although claim construction would always appear to be a logical issue for interlocutory appeal in a patent case, the authors were unable to find any instance in which the Federal Circuit accepted such an appeal. This is not to say that litigants should cease trying to obtain interlocutory review on the issue of claim construction. For the moment, however, the odds that the Federal Circuit will conduct such a review are fairly small.

J. Judgment Upon Multiple Claims

In the event that interlocutory appeal on the issue of claim construction is not successful, it is possible for a party receiving an unfavorable claim construction to accept final judgment against it on the issue of infringement under the Federal Rules of Civil Procedure 54(b). In that circumstance, the district court may, in its discretion, stay the proceedings on counterclaims such as validity and enforceability.[42] Obviously the party requesting such an adverse final judgment must have decided that he is incapable of prevailing on the ultimate issue of infringement, given the particular claim construction put forth by the court.

Should the district court certify a final judgment under Federal Rules of Civil Procedure 54(b), the Federal Circuit would then consider the entire issue of infringement, including claim construction, in reviewing that judgment. Should the Federal Circuit reverse the district court's claim construction, then the entire matter would be remanded for a new proceeding before the district court in light of the Federal Circuit's claim construction.

II. CONCLUSION

The various issues related to claim construction in light of *Markman* are far from settled. District courts are, in many instances, still feeling around the elephant with a blindfold on. For now, judges will continue to depend heavily upon the litigants to advise them on the best way to handle the issue of claim construction. The litigants, in turn, are limited only by their imaginations in the suggestions they may make to the courts.

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41. 28 U.S.C. § 1292(b) (1994).

42. *See* Trilogy Communications, Inc. v. Times Fiber Communications, Inc., 109 F.3d 739, 741 (Fed. Cir. 1997).