

Supremely Confusing on That Complex Word “A”; Is It Only One or Is It One or More?

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A patent drafter’s selection of even the smallest of words, like “a,” may have a significant impact on how a claim is construed. Does “a” mean “at least one”? Or does it mean just “one”? As the case law we explore in this article indicates, it can be both! And as will be seen, recently a split Supreme Court muddled through over 40 pages to try to decide what “a” meant in a particular statute.

“A” Means “One or More”

In *KCJ Corp. v. Kinetic Concepts, Inc.*, 223 F.3d 1351 (Fed. Cir. 2000), the claim phrase at issue read, “1. An air flotation, ventilated mattress apparatus comprising: ... a lower, continuous, inflatable chamber....” The Federal Circuit asked, “does the article limit the number of chambers to only one or does it cover one or more chambers?” *Id.* at 1355. The district court construed “a” to mean only one because more than one chamber would “sacrifi[ce] the concept of continuity.” *Id.* at 1356. The Federal Circuit, however, noted the claim construction principle that:

an indefinite article “a” or “an” in patent parlance carries the meaning of “one or more” in open-ended claims containing the transitional phrase “comprising.” ... Unless the claim is specific as to the number of elements, the article “a” receives a singular interpretation only in rare circumstances when the patentee evinces a clear intent to so limit the article. ... Under this conventional rule, the claim limitation “a,” without more, requires at least one.

Id. According to the Federal Circuit, in this case, there was no suggestion of an exceptional meaning for “a.” *Id.* at 1839. The Court construed “a” to mean “one or more,” and therefore, the claim read on the accused devices. *Id.*

The Federal Circuit reached a similar conclusion in *Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 512 F.3d 1338 (Fed. Cir. 2008), where the claim at issue read:

32. A pre-packaged, pre-soaked cleaning system for use to clean the cylinder of printing machines comprising in combination:

1. a pre-soaked fabric roll ..., and said system including
2. means for locating said fabric roll adjacent to and operatively associated with a cylinder to be cleaned.

In construing “a” as “one or more” (and overturning the district court construction of “a” as “a single pre-soaked fabric roll”), the Federal Circuit noted that “a” is construed as “‘one or more’ in open-ended claims containing the transitional phrase ‘comprising.’” *Id.* at 1342.

In both of these cases, the Federal Circuit interpreted “a” to mean more than just a single item, allowing the subject claims to read on a wider range of potentially infringing products.

“A” Means “Only One”

But the Federal Circuit has not always held that “a” means “one or more.”

For example, the claim phrase at issue in *Harari v. Lee*, 656 F.3d 1331 (Fed. Cir. 2011) read: “a) accessing a number of control gates and accessing a bit digit line, thereby activating a said number of memory cells” The Board construed “a” to include more than one, and therefore disclosure of accessing multiple bit lines provided sufficient written description support.

The Federal Circuit noted *Baldwin* but commented that “*Baldwin*... does not set a hard and fast rule that ‘a’ always means one or more than one.” *Id.* at 1059. Rather, “[w]hen the claim language and specification indicate that ‘a’ means one and only one, it is appropriate to construe it as such even in the context of an open-ended ‘comprising’ claim.” *Id.* (citing *Insituform Techs., Inc. v. CAT Contr., Inc.*, 99 F.3d 1098, 1106 (Fed. Cir. 1996)). According to the Federal Circuit, in this case, “[t]he plain language of the claim clearly indicates that only a single bit line is used when accessing a number of cells.” *Id.* In particular, there was a distinction between singular and plural forms several times in the recited steps. In addition, the specification supported a singular construction.

In *Insituform*, the construction of the term “a” in the claim determined the difference between infringement and noninfringement. The claim read:

1. A method of impregnating with a curable resin an inner layer of resin absorbent material disposed in an elongate flexible tube ..., the method comprising the steps of: ...
- (3) drawing through the window a vacuum in the interior of the tube downstream of said one end by disposing over the window a cup connected by a flexible hose to a vacuum source ...,
- (5) when the resin reaches the vicinity of the region of vacuum application, removing the cup and sealing the window,
- (6) providing another window in the impermeable layer of the tube downstream of the previously formed window, ..., and
- (8) repeating steps 5, 6, and 7, where necessary to impregnate the entire resin absorbent inner layer

of the flexible tube.

If “a” meant one and only one vacuum cup, the vacuum was discontinuous, and there was no literal infringement because the accused processes maintained a continuous vacuum.

The Federal Circuit found that nothing in the claim language suggested using more than one cup and noted that some claim language was in fact inconsistent with using more than one cup. The specification did not disclose use of more than one cup. The Federal Circuit concluded that “the only correct and indeed the reasonable interpretation of claim 1 limits the scope of that claim to a process using only one vacuum cup, which inherently creates a discontinuous vacuum.” *Id.* at 1106.

The use of the term “comprising” did not sway the Court either:

While adding elements may, in certain instances, fail to prevent a finding of infringement, it will prevent a finding of literal infringement where, as here, the claim is specific as to the number of elements (one cup) and adding elements eliminates an inherent feature (discontinuous vacuum) of the claim.

Id.

Thus, although the Federal Circuit has shown a willingness to expand the meaning of “a” to include more than just one, the word may still be limiting if the specification and context indicate that it truly means only “one.”

Supremely Confusing

Although not a patent case, the Supreme Court recently analyzed whether the use of “a” indicated one or “at least one.” In *Niz-Chavez v. Garland*, 593 U.S. ____ (2021), a majority of the Court, in a 5-3 decision, held that “a” meant “one.”

The issue arose in the context of a federal law that requires the government to serve “a notice to appear.”^[1] Some circuits interpreted the law to require a single notice, while others allowed several notices.

Justice Gorsuch, joined by Justices Thomas, Breyer, Sotomayor, Kagan, and Barrett, drafted the majority opinion reversing the judgment of the Sixth Circuit. According to the majority:

To trigger the stop-time rule, the government must serve “a” notice containing all the information Congress has specified. To an ordinary reader—both in 1996 and today — “a” notice would seem to suggest just that: “a” single document containing the required information, not a mishmash of pieces with some assembly required.

Id. at *4-5. After conducting a statutory interpretation analysis, the majority held to the “ordinary meaning” of the word. The majority found neither policy arguments nor administrative burdens persuasive:

At one level, today’s dispute may seem semantic, focused on a single word, a small one at that. But words are how the law constrains power. In this case, the law’s terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him. If men

must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.

Id. at *16.

Justice Kavanaugh filed a dissenting opinion, joined by Justices Roberts and Alito, and characterized the issue as “whether the Government may serve a notice to appear in two documents instead of one.” *Dissent*, at *4. “The statute nowhere says that written notice must be provided in a single document.” *Id.* at *7. According to the dissent, the majority opinion applied “literal” meaning rather than “ordinary” meaning. *Id.* at *10. “As a matter of ordinary parlance, however, the word ‘a’ is not a one-size-fits-all word.” *Id.* The dissent would interpret “a notice” as fulfilled by more than one notification.

The *Niz-Chavez* case provides a warning shot on the varying potential interpretations of the deceptively short word “a.” Depending on the circumstances—and perhaps even the judge or panel—the interpretation of “a” could change.

Takeaways

A patent drafter’s selection of words, even seemingly minor words, may significantly impact how a claim is construed or whether it is found unpatentable. As the Federal Circuit has noted, it is the patent drafter’s responsibility to avoid “textual sloppiness” (*SIMO Holdings, Inc. v. H.K. uCloudlink Network Tech., Ltd.*, 983 F.3d 1367, 1378 (Fed. Cir. 2021)); resolve ambiguity (*Halliburton Energy Services, Inc. v. M-I LLC*, 514 F.3d 1244, 1255 (Fed. Cir. 2008)); and bear the cost of any failure (*Sage Products, Inc. v. Devon Industries, Inc.*, 126 F.3d 1420, 1425 (Fed. Cir. 1997)).

While construing “a” to mean “at least one” or “one or more” may be conventional, it is not a hard and fast rule, as the Federal Circuit has recognized. Practitioners should draft claims carefully to increase their chances of having their claims construed as intended. Consider how the decision-maker will construe the claims in light of the obfuscating construction that the opponent will assert, or everything may be lost. As the Court said in *Athletic Alternatives, Inc. v. Prince Manufacturing, Inc.*, 73 F.3d 1573 (Fed. Cir. 1996):

Where there is an equal choice between a broader and a narrower meaning of a claim, and there is an enabling disclosure that indicates that the applicant is at least entitled to a claim having the narrower meaning, we consider the notice function of the claim to be best served by adopting the narrower meaning.

Id. at 1581.

One final note: if you are going to get invited to “a lunch” at the Supreme Court, try to wrangle the invite from Justice Kavanaugh rather than Justice Gorsuch. If Justice Kavanaugh invites you to “a” lunch, you may well get multiple lunches! With Justice Gorsuch, “a” lunch sounds like it may be one and only one lunch.

^[1]The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546.

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