

No. 05-961

In the Supreme Court of the United States

IZUMI PRODUCTS COMPANY,

Petitioner,

v.

KONINKLIJKE PHILIPS ELECTRONICS N.V.,
PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, AND
PHILIPS DOMESTIC APPLIANCE AND PERSONAL CARE B.V.,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Izumi's petition documented the deep and widely recognized division within and among panels of the Federal Circuit concerning how to interpret patent claims in light of enabling disclosures. The petition explained that this division leads to uncertainty regarding the scope of patents, which in turn impedes efficient investment in innovation and spawns infringement litigation.

The petition also demonstrated that, uncertainty aside, the methodology employed by the panel majority's decision below (which exemplifies one line of Federal Circuit precedent), by allowing the enabling disclosure to define claim terms by implication, contravenes Congress' careful separation in 35 U.S.C. § 112 of the claims element from the enabling disclosure element and thus undermines the latter's function.

Finally, the petition explained that this case is an ideal vehicle for this Court to resolve the methodological debate because in this case, the choice of methodology determines the outcome: the ordinary meaning of the claim term "recess" does not support an angular limitation, and only by relying on an inference from the enabling disclosure was the majority below able to narrow the scope of the claims. Respondents have no answer to these arguments, which they either sidestep or ignore altogether. Review by this Court is plainly warranted.

This Court's denial of certiorari in *Phillips*, No. 05-602, is beside the point. The *Phillips* petitioner curiously chose *not* to present the question of patent interpretation methodology that Izumi presents here, despite the fact that the *en banc* court in *Phillips* devoted considerable attention to it. Instead, the *Phillips* petitioner presented the entirely different question whether the *de novo* standard governs appellate review of a district court's patent interpretation, see Pet. for cert. in No. 05-602, at i, a question the *en banc* majority in *Phillips*

expressly declined to address. See *Phillips v. AWH Corp.*, 415 F.3d 1303, 1328 (Fed. Cir. 2005). (The *Phillips* respondent in turn opposed certiorari on grounds also wholly inapposite here, including that the *en banc* majority failed to address the standard of review question and that the case was in an interlocutory posture. Br. in Opp. in No. 05-602, at 6–8.)

Thus, respondents mislead this Court in describing (Opp. 11) the *Phillips* petition as presenting the same question that Izumi presents in this petition.¹ To the contrary, this case presents the very question the *Phillips en banc* decision addressed but the *Phillips* petitioner chose *not* to pursue. Its resolution remains of vital importance to patent litigants despite the denial of certiorari in *Phillips*.

I. THERE IS AN IMPORTANT AND UNRESOLVED CONFLICT OVER THE PROPER USE OF ENABLING DISCLOSURES IN PATENT CLAIM CONSTRUCTION.

1. Respondents simply ignore the deep division in the Federal Circuit’s case law before *Phillips*, instead describing the Circuit’s pre-*Phillips* decisions as involving nothing more than application of “well-settled” principles. Opp. 7. This suggestion is flatly contradicted by repeated statements by members of the Federal Circuit itself describing and lamenting a profound intracircuit conflict, and by the uniform view

¹ Nor, contrary to respondents’ suggestion (Opp. 6), is it relevant that the decision below was unpublished. This Court routinely grants certiorari without regard to whether the decision below was published. See, e.g., *Williams v. Overton*, No. 05-7142, cert. granted, March 6, 2006; *Zurich Ins. Co. v. Chatham County*, No. 04-1618, cert. granted, Oct. 11, 2005; *Domino’s Pizza, Inc. v. McDonald*, 544 U.S. 998 (2005); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 534 U.S. 1016 (2001) (patent case arising from Federal Circuit).

of commentators. That this conflict has arisen notwithstanding the “well settled” principles respondents identify is hardly surprising, for those principles (and counter-principles) are phrased so abstractly that they provide little practical guidance. Cf. K. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

As the petition described (at 5, 14), the Federal Circuit has developed two competing and inconsistent approaches to patent interpretation, one focusing on patent claims and the other using enabling disclosures to redefine those claims. Compare, e.g., *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1204 (Fed. Cir. 2002) (claim-focused approach) (prohibiting “[c]onsult[ation] [of] the written description * * * as a threshold step in the claim construction process, before any effort is made to discern the ordinary and customary meanings attributed to the words themselves * * *”) (emphasis added), with *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996) (enabling disclosure-focused approach) (enabling disclosure may “defin[e] [claim] terms by implication”). Only by ignoring one side of this conflict (*Texas Digital* and progeny) can respondents deny (Opp. 7–8) that the conflict exists.

As the petition outlined (at 15), and respondents ignore, repeated statements by Federal Circuit judges expressly acknowledge and bemoan this deep intracircuit split and the confusion it engenders among litigants and the lower courts. See, e.g., *Merck & Co. v. Teva Pharms. USA, Inc.*, 395 F.3d 1364, 1377 (Fed. Cir. 2005) (Rader, J., dissenting) (the Circuit’s “claim constructions wave[r] between the plain meaning rule * * * and the ‘specification über alles’ rule”); *Housey Pharms., Inc. v. Astrazeneca UK Ltd.*, 366 F.3d 1348, 1357 (Fed. Cir. 2004) (Newman, J., dissenting) (“This case again illustrates the conflict generated in the court’s recent jurisprudence of claim construction.”). As Judge Dyk aptly observed in his concurrence in *SciMed Life Systems*,

Inc. v. Advanced Cardiovascular Systems, Inc., 242 F.3d 1337, 1347 (Fed. Cir. 2001), “The problem is that our decisions provide inadequate guidance as to when it is appropriate to look to the specification to narrow the claim by interpretation and when it is not appropriate to do so. Until we provide better guidance, I fear that the lower courts and litigants will remain confused.”

Indeed, the *en banc* court in *Phillips* explicitly recognized the conflict in its order granting review. See 376 F.3d at 1383 (acknowledging the view of “the claim construction methodologies in the majority and dissent of the now-vacated panel decision as alternative, conflicting approaches”).² See also 415 F.3d at 1319 (“some of this court’s cases have suggested a somewhat different approach to claim construction”). In short, the existence of an intracircuit conflict is undeniable.

2. As the petition explained (at 15–16), the *en banc* court in *Phillips*, despite its best efforts, failed to resolve the disagreement, instead “restating * * * the basic principles of claim construction outlined [in the pre-*Phillips* cases]” (*ibid.*) and thus leaving the Circuit’s judges in future cases free to invoke either set of principles. To quote the *Phillips* dissent, “The court’s opinion today is akin to rearranging the deck chairs on the Titanic—the orchestra is still playing as if nothing is amiss, but the ship is still heading for Davey Jones’ locker.” 415 F.3d at 1334–35 (Mayer, J., dissenting, joined by Newman, J.). See also *id.* at 1330 (“[W]e say nothing new, but merely restate what has become the practice over

² Commentators uniformly understood the grant of *en banc* review as the Circuit’s recognition of a conflict on patent interpretation methodology. See, e.g., J. Molenda, *Understanding the Federal Circuit’s Internal Debate and its Decision To Rehear Phillips v. AWH Corp. En Banc*, 86 J. PAT. & TRADEMARK OFF. SOC’Y 911, 911 (2004).

the last ten years * * *”). Respondents offer no rebuttal to the *Phillips* dissent’s assessment of *Phillips*.

The dissent’s analysis is corroborated by the views of numerous commentators and by the continued pattern of division along methodological lines in the Circuit’s infringement decisions. See Pet. 16–17. Again, respondents confront neither point.

First, multiple commentators have expressed the view that “[i]f courts and litigants must continue to rely on generic recitations of the same ‘well-settled’ construction principles, while guidance on thornier interpretative questions is avoided, there is little reason to hope that the ad hoc and inconsistent nature of claim construction will be ameliorated any time soon.” D. Wolfsohn & A. Goranin, *Phillips v. AWH: The Federal Circuit’s Missed Opportunity*, THE LEGAL INTELLIGENCER, Sept. 14, 2005, at 8. See also C. Crottopia, *Observations on Recent Patent Decisions: The Year in Review*, 88 J. PAT. & TRADEMARK OFF. SOC’Y 46, 51 (2006) (similar); Pet. 16 (citing a similar article and treatise).

Second, divisions in the Federal Circuit’s patent interpretation decisions are just as frequent after *Phillips* as before. See *nCube Corp. v. Seachange Int’l, Inc.*, 436 F.3d 1317, 1326 (Fed. Cir. 2006) (Dyk, J., dissenting); *Dorel Juvenile Group v. Graco Children’s Prods., Inc.*, 429 F.3d 1043, 1047 (Fed. Cir. 2005) (Newman, J., dissenting); *Free Motion Fitness, Inc. v. Cybex Int’l, Inc.*, 423 F.3d 1343, 1353 (Fed. Cir. 2005) (Prost, J., dissenting); Pet. App. 16a (Linn, J., dissenting).³ See also *Briggs & Stratton Corp. v. Kohler Co.*, 408 F. Supp. 2d 697, 699–700 (W.D. Wis. 2006) (under *Phillips*, “striking a balance between an overly restrictive and an overly broad construction can be as treacherous as navigating between Scylla and Charybdis”). And it is clear that the divi-

³ Though the panel decision below was decided before *Phillips*, rehearing was denied after *Phillips*. See Pet. App. 62a.

sions turn on the same broad methodological debate that raged before *Phillips*. See, e.g., *Free Motion*, 423 F.3d at 1355 (Prost, J., dissenting) (“The majority’s approach, in my view, does not attempt to determine what the inventor actually invented, but rather takes the broadest available abstract meaning of a claim term that is not explicitly rejected by the specification.”); *Dorel*, 429 F.3d at 1050 (Newman, J., dissenting) (“The majority’s approach to claim construction strains this court’s attempts [in *Phillips*] to restore consistency of analysis to patent claims by placing the claims in the context of the specification.”); Pet. App. 16a (Linn, J., dissenting) (the majority “improperly reads a limitation from the specification into the claims”). These cases confirm that “*Phillips* does not provide a fix for this broken pillar of substantive patent law.” R. HARMON, PATENTS AND THE FEDERAL CIRCUIT § 6.1(d), p. 51 (7th ed., 2006 Supp.).

3. Respondents do not contest the petition’s showing that uncertainty in patent claim interpretation produces substantial, adverse effects on the economy by impeding efficient investment in innovation and spawning infringement litigation. See Pet. 17–18 (quoting *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390 (1996)). Nor do respondents dispute that greater certainty in claim interpretation is attainable if the proper methodology is adopted. See Pet. 20, 25–26; R. Wagner & L. Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1162 (2004) (“a small group [of Federal Circuit judges] is substantially consistent”; “this consistent group overlaps perfectly with the Proceduralist [*i.e.*, claim-focused] [methodology] * * *”). Cf. D. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1580 (1997) (the plain meaning approach to statutory interpretation has provided an “easy, relatively non-divisive way to resolve difficult issues”).

II. RESPONDENTS OFFER LITTLE DEFENSE OF THE ENABLING DISCLOSURE-FOCUSED APPROACH EXEMPLIFIED BY THE DECISION BELOW.

The petition explained (at 20–24) that the Federal Circuit’s claim interpretation case law not only perpetuates undesirable uncertainty, but violates 35 U.S.C. § 112 and its underlying purposes by countenancing the use of the enabling disclosure to narrow impliedly even the clearest of claims, as the panel majority did below.

As to Section 112, the petition explained (at 3, 21) that Congress’ deliberate decision in 1952 to set forth the claims and enabling disclosure requirements in separate paragraphs underscores that the claims are the touchstone in determining a patent’s scope. See also P.J. Federico, *Commentary on the New Patent Act*, 35 U.S.C.A. Vol. 1, p. 25 (1954) (“In the old statute the requirement for a claim pointing out what the applicant regarded as his invention appeared as a clause in the same sentence relating to the description, which led to some confounding of the nature of the two requirements in a few decisions. In the new statute the clause relating to the claim has been made a separate paragraph to emphasize the distinction between the description and the claim * * *”).

As to policy, the petition demonstrated (at 23–24) that allowing the disclosure to narrow the claims encourages inventors to provide an opaque disclosure, thereby undermining the function of the disclosure to facilitate the public’s ability to practice and improve upon the patented invention.

The approach employed by the panel majority below (and in numerous other Federal Circuit decisions), which turns immediately to the enabling disclosure and draws from it an implicit limitation on the ordinary meaning of the claims, violates both the statute and its underlying policy.

1. Again, respondents fail almost entirely to confront these points. Their principal response — that relying on inference from the enabling disclosure to read limitations on the claims’ scope does not undermine the claims because “the claims *must* be read in the context of the patent as a whole” (Opp. 13) — merely assumes the answer to the question presented.

2. The petition cited (at 22) *Smith v. Snow*, 294 U.S. 1 (1935), and *McCarty v. Lehigh Valley R. Co.*, 160 U.S. 110, 116 (1895), as examples of this Court’s recognition — even before the 1952 amendment in which Congress stressed the importance of the claims as a distinct element — that “the claims of the patent, not its specifications, measure the invention.” *Smith, supra*, at 11. Respondents do not address *McCarty*, but contend (Opp. 13–14) that the petition misreads *Smith*. In fact *Smith*, like the dissent below, correctly declined to draw any implicit limitations from the enabling disclosure and instead discerned the ordinary meaning of the claims from their text, including a comparison of one claim with another. See 294 U.S. at 13–14; Pet. App. 20a–21a. In any event, *Smith* has not prevented the Federal Circuit from developing two divergent methodologies, one of which is more prone to narrowing the claims by resort to the enabling disclosure (in violation of 35 U.S.C. § 112 and its underlying policies).

3. Respondents mischaracterize the approach the petition urges as the proper one under the statute as a “refusal * * * to recognize virtually any role for the specification [*i.e.*, enabling disclosure] in claim construction.” Opp. 14. To the contrary, petitioner endorses a role for the enabling disclosure analogous to that commonly used in contract and statutory interpretation: (1) a court should begin with the text of the patent claims, using ordinary tools of construction in an attempt to discern the ordinary meaning of the claims; (2) *if* at the end of that process the court concludes the claims are ambiguous, then the court may consult the enabling disclo-

sure to resolve the ambiguity. Accord, *Bates v. Coe*, 98 U.S. 31, 38 (1878) (“*in case of doubt or ambiguity* it is proper in all cases to refer back to the descriptive portions of the specification * * *”) (emphasis added).⁴

III. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING THE LONGSTANDING CONFLICT OVER THE PROPER USE OF ENABLING DISCLOSURES IN PATENT CLAIM CONSTRUCTION.

1. Respondents do not contest that this case is an ideal vehicle for this Court to resolve the division within the Federal Circuit over how to interpret patent claims in light of enabling disclosures. The majority below relied on the enabling disclosure to restrict the claims in Izumi’s patent to inner cutter blades that form a 90-degree or smaller angle with the cutting surface. As discussed in the petition (at 26–27), however, the ordinary meaning of the claim terms “recess,” “below,” and “immediately beneath” provides no basis for interpreting the claims to impose such an angular limitation. To the contrary, as the dissent below gleaned from the dictionary and a comparison of the text of claim 1 with that of claim 3 (see Pet. App. 20a–21a), a properly claim-focused

⁴ Additionally, even where the scope of the claims can be discerned from their plain meaning, that scope may be narrowed if the claims or the enabling disclosure *explicitly* disavow that scope or *explicitly* define a claim term in a restrictive way. See Pet. 25 & n.15.

While the prosecution history of Izumi’s patent is “not at issue here” (Opp. 7), we note that this Court’s cases are consistent with the claim-focused approach because they contemplate that only *unequivocal* disclaimers of claim scope during patent application can narrow the claims’ ordinary meaning. See, e.g., *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 733 (2002); *Graham v. John Deere Co.*, 383 U.S. 1, 33 (1966).

approach straightforwardly rejects any angular limitation in this case. Thus, this case requires a choice between legal interpretive approaches, and turns not at all on disputed questions of how these approaches apply to the facts.

Relatedly, respondents have not even attempted to explain how the decision below can be reconciled with the claim-focused interpretive methodology. This again shows that, contrary to respondents' contention, the petition presents a clear legal issue, not simply a dispute over the application of well-settled principles to the facts of this case.

2. The deep intracircuit conflict on patent claim interpretation is no less national in scope than the intercircuit conflicts this Court addresses in other areas of the law: The Federal Circuit has exclusive jurisdiction over patent appeals, which arise from district courts across the country. And "[i]nterpreting the words in the claims is very important in most patent litigation because it is the *first step* in determining * * * whether the patent is infringed * * *." H. SCHWARTZ, PATENT LAW AND PRACTICE 110 (4th ed. 2003) (emphasis added). Given the practical consequences that hinge on the choice of methodology, and the deficiencies in the Federal Circuit approach the majority employed below, this Court's review is strongly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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