



Archetype IP

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In 2014, the Supreme Court clarified the standard for indefiniteness, holding that a claim is invalid for indefiniteness if, when read in light of the specification and the prosecution history, it “fail[s] to inform, with reasonable certainty, those skilled in the art about the scope of the invention.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S.Ct. 2120 (2014). The policy basis for that standard is a “delicate balance” between “the inherent limitations of language” and providing “clear notice of what is claimed.” *Id.* at 2129.

Sonix Technology v. Publications International (January 5) illustrates how that standard and the underlying “delicate balance” policy apply to terms of degree. The claims in *Sonix* called for an information-encoding graphical indicator (e.g., like a bar code) to be “visually negligible.” The district court held the claim indefinite because the phrase “visually negligible” was “purely subjective” and there was insufficient guidance in the specification as to the objective boundaries of the scope of what is and is not visually negligible.

The Federal Circuit reversed, holding that “a skilled artisan would understand, with reasonable certainty, what it means for an indicator in the claimed invention to be ‘visually negligible’” and drawing a distinction between terms of degree that are indefinite as purely subjective and terms of degree for which adequate guidance as to scope is provided. As examples of terms of degree that were purely subjective, and hence indefinite, the Federal Circuit cited two cases:

- *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342 (Fed. Cir. 2005): Claim phrase “aesthetically pleasing” held indefinite even though the specification provided guidance about relevant design elements because ultimately the scope of the claim was “completely dependent on a person’s subjective opinion.”
- *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364 (Fed. Cir. 2014): Claim requiring content to be displayed in “in an unobtrusive manner that does not distract a user” held indefinite because what was unobtrusive and non-distracting was ultimately left to the “unpredictable vagaries of any one person’s opinion.”

In contrast, the Federal Circuit explained that “visually negligible” was not wholly subjective and instead relates to “what can be seen by the normal human eye,” which provides an “objective baseline.” Further, the specification provided a general exemplary design for a visually-negligible indicator, “requirements for the graphical indicators being negligible to human eyes” (e.g., relating to differentiability, brightness, and homogeneity), and two specific examples of visually-negligible indicators that provide “points of comparison.” Using that information, a person of skill could determine whether a graphical indicator was visually negligible.

Thus, a term of degree is more likely to be definite if (i) the specification provides objective standards or criteria for determining scope, including specific examples that can be used as points of comparison, and (ii) it does not depend for its meaning or scope on subjective opinions or other criteria upon which reasonable minds could readily differ.