

The path-dependence of claim construction, and its implications for predictability in patent litigation

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By now the 'unpredictability' of claim construction in patent litigation is axiomatic, and increasingly dominates proposals for patent reform. There is less reason to believe that claim construction is problematic as is commonly supposed, if we consider the evidence for unpredictability and its consequences. Nonetheless, if we believe that claim interpretation is unusually unpredictable, I contend that we do not understand why. None of the conventional explanations for unpredictability -- the indeterminacy of the Federal Circuit's jurisprudence; the inexperience of the district courts; or the *de novo* review of claim interpretations -- is sufficient to explain the observed patterns in patent litigation. A more likely explanation rests in the comparative structure of trial and appellate decision-making, and the cognitive mechanisms that underlie the interpretive process. On this view, unpredictability results not from deficiencies in the law of claim interpretation, but from the path-dependence of the interpretive process. I test this model by empirical investigation of the relationship between the structure and stability of patent claim construction rulings. In light of this analysis, we must reconsider whether measures proposed to make claim construction more predictable are likely to succeed, and whether gains in predictability are worth the sacrifices necessary to achieve it.