

No. 12-48

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**In the Supreme Court of the United States**

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THREE-DIMENSIONAL MEDIA GROUP, LIMITED,  
PETITIONER

*v.*

DAVID J. KAPPOS, DIRECTOR, PATENT AND TRADEMARK  
OFFICE

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether the Federal Circuit erred in summarily affirming the reexamination decision of the Board of Patent Appeals and Interferences, which construed the term “three-dimensional image” in petitioner’s patent to have its plain and ordinary meaning.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 157-158) is not available in the Federal Reporter but is reprinted in 441 Fed. Appx. 770. The opinion of the Board of Patent Appeals and Interferences (Pet. App. 1-102) is available at 2010 WL 3017280.

### JURISDICTION

The judgment of the court of appeals was entered on December 12, 2011. A petition for rehearing was denied on February 10, 2012 (Pet. App. 159-160). On April 27, 2012, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 9, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Each written application for a patent must include “a specification as prescribed by section 112” of the Patent Act. 35 U.S.C. 111. The specification must “contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains \* \* \* to make and use the same.” 35 U.S.C. 112, ¶ 1. “The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.” 35 U.S.C. 112, ¶ 2.

The process of claim construction determines the metes and bounds of what is claimed (and therefore protected against infringement) by a patent. Claim construction is a legal question to be decided by a court. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). When a district court engages in claim construction, its role “is neither to limit nor to broaden the claims, but to define, as a matter of law, the invention that has been patented.” *Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1352 (Fed. Cir. 2001). “‘Claim construction’ is the judicial statement of what is and is not covered by the technical terms and other words of the claims.” *Ibid.*

In contrast, when an unexpired patent undergoes a reexamination by the Patent and Trademark Office (PTO) (as when the PTO initially considers an application for a patent), its claims are ordinarily given their broadest reasonable interpretation, consistent with the patent disclosure. See *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). The standard employed in such a proceeding is different because the patentee has the opportunity during prosecution and

reexamination to amend his claims to obtain more precise claim coverage. *Id.* at 1364. When the PTO reexamines an expired patent, however, the opportunity for amendment has passed. In those cases, the PTO applies claim-construction rules similar to those that a court would apply. *Ex parte Papst-Motoren*, 1 USPQ2d 1655, 1656 (BPAI 1986).

2. On May 15, 1990, the PTO issued Patent No. 4,925,294 (the '294 patent), entitled "Method to Convert Two Dimensional Motion Pictures For Three-Dimensional Systems." Pet. App. II at 1. In its specification, the patent describes a method for taking ordinary "two-dimensional motion picture film" and segregating particular images on the film for further processing. *Id.* at 4-7. Those image elements are manipulated in various ways and re-recorded, with the result that, when the new film is viewed as part of an appropriate "3-D" system (such as with 3-D glasses), the new film is perceived as containing "at least some \* \* \* 3-D characteristics." *Id.* at 5.

The '294 patent contains 44 separate claims. Pet. App. II at 7-8. Claims 1, 35, 36, 37, and 42 are independent claims; the rest are dependent claims. *Ibid.*; Admin. Record Doc. No. 7, at 3 (Initial Office Action); see C.A. J.A. 90 (listing documents in the administrative record). Claim 1 of the '294 patent covers:

A method of converting a two-dimensional image frame into a three-dimensional image frame consisting of the steps of:

- a. inputting a frame of a two-dimensional image into a computer;
- b. specifying at least two individual image elements in the two-dimensional image;

- c. separating the two-dimensional image into said image elements;
- d. specifying three-dimensional information for at least one of said image elements;
- e. processing at least one of said image elements to incorporate said three-dimensional information and create at least one processed image element;
- f. generating at least one processed image frame comprising at least one of said processed image elements.

Pet. App. II at 7. Because all of the other claims (both dependent and independent) refer back to Claim 1 and/or use the term “three-dimensional” or “3-D,” *id.* at 7-8, petitioner has treated Claim 1 as representative of all claims affected by the disputed question in this case, see Pet App. 23-24.

3. Petitioner owns the '294 patent. Pet. App. 3. In 2005, petitioner and its licensee filed suit against a competitor, alleging infringement of the '294 patent and seeking a preliminary injunction. *Id.* at 103. At approximately the same time, the competitor asked PTO to conduct a reexamination of the '294 patent, and PTO agreed to do so. Pet. App. 3; Gov't C.A. Br. 2; see 35 U.S.C. 301-307; 37 C.F.R. 1.510(a).

a. In January 2006, the PTO examiner issued an Initial Office Action that rejected all but one of the claims in the '294 patent. Pet. App. 151; Initial Office Action 13-33. The examiner concluded, *inter alia*, that several claims were invalid because they were anticipated by one or both of two earlier-issued patents. Gov't C.A. Br. 2; Initial Office Action 13-20. The first preexisting patent—the Falk patent—described a computer-aided



process of adding texture information to two-dimensional images to create the appearance of depth. Pet. App. 13-16. The second preexisting patent—the Oka patent—described a process for transforming a video image into a mathematically defined three-dimensional curved image. *Id.* at 16-18. In concluding that most of the '294 patent claims were invalid because they were anticipated in the Falk and Oka patents, the examiner noted that he had “broadly interpreted” the term “three-dimensional image frame” in the '294 patent claims to be “inclusive of two-dimensional images that have been enhanced to give the appearance of three-dimensionality.” See, *e.g.*, *id.* at 155; Initial Office Action 13-19.

Petitioner contested the examiner’s initial decision, in particular by challenging the examiner’s interpretation of the term “three-dimensional.” Pet. App. 149. Petitioner argued that the '294 patent referred only to *stereoscopic* images—that is, images that give the illusion of depth by presenting slightly different images to the right and left eyes.<sup>1</sup> *Id.* at 149-150, see *id.* at 24, 104. Rather than challenging the examiner’s initial decision, petitioner could have amended its patent to adopt a narrower definition of “three-dimensional image.” See 35 U.S.C. 305; 37 C.F.R. 1.530; *In re Yamamoto*, 740 F.2d 1569, 1571 (Fed. Cir. 1984).

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<sup>1</sup> In ordinary vision the brain creates a composite image based on inputs received from both the right and left eyes. Because the right and left eyes are located in slightly different places, the two images sent to the brain will be slightly different from one another, and this image differential conveys important depth information. Some three-dimensional viewing systems attempt to exploit that differential in order to trick the mind into perceiving depth. 3-D glasses, for example, often have filters or polarized lenses that are designed to present different images to each eye. See Pet. App. 104.

While the examiner was considering petitioner's challenge, the term of patent '294 expired, thereby foreclosing petitioner's ability to amend the patent. Pet. App. 22. When an examiner reexamines a patent that has not yet expired, he gives the claims their "broadest reasonable construction consistent with the specification." *Ibid.* Under Board precedent, once a patent expires, the examiner must construe claims in substantially the same manner as they would be construed in an infringement suit—*e.g.*, in light of the specification and prosecution history when appropriate. *Id.* at 22-23. The examiner therefore issued a Final Office Action in June 2007 that did not purport to utilize the "broadest reasonable construction" standard that he had applied in his initial decision. C.A. J.A. 249-307. Instead, the examiner determined that the "proper and fair" meaning of the term "three-dimensional image," as used throughout patent '294, extends beyond stereoscopic images. C.A. J.A. 262; see *id.* at 261-285. Accordingly, the Final Office Action again rejected a number of claims as anticipated by the Falk and Oka patents, in addition to again rejecting a large (and overlapping) number of claims on other grounds. Pet. App. 6-7.

b. Petitioner appealed to the Board of Patent Appeals and Interferences (Board), which affirmed the examiner's decision. Pet. App. 1-102. Because the '294 patent had expired during reexamination, the Board declined to apply the "broadest reasonable construction" standard. *Id.* at 22 (citing *Ex parte Papst-Motoren*, 1 USPQ2d at 1656). Instead, the Board used "claim construction rules as followed in infringement suits" as an "appropriate guide[]," *ibid.*, recognizing the role the specification can play in claim construction, *id.* at 23 (cit-

ing *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc), cert. denied, 546 U.S. 1170 (2006)).

The Board noted that the central question before it “involves whether ‘three-dimensional image’ as recited in claim 1 should be restricted to mean ‘stereoscopic three-dimensional image.’” Pet. App. 24. The Board observed that petitioner had not contended that the ordinary meaning of that term excludes “non-stereoscopically produced images,” and that petitioner had therefore waived any argument that the examiner’s interpretation of the term was contrary to its plain meaning. *Id.* at 26 & n.9, 37. The Board further concluded that, even if the term’s ordinary meaning were in dispute, the term is naturally understood to extend beyond stereoscopic images. *Id.* at 26 n.9 (citing the American Heritage dictionary, the Encarta encyclopedia, the Falk and Oka patents, and the ’294 patent itself); see *id.* at 13-20.

Because the Board concluded that the plain meaning of “three-dimensional image” favored the examiner’s interpretation, the only remaining issue was whether the ’294 patent had provided a “special definition” of the term that restricted it to stereoscopic images. Pet. App. 26-29. The Board concluded that it had not, observing that multiple portions of the patent’s specification had clearly used the phrase “three-dimensional” more broadly. *Id.* at 26-39. For example, several different phrases in the specification contrasted “3-D” or “three-dimensional” graphic techniques with stereoscopic techniques that specifically focused on splitting an image into right-eye and left-eye views. *Id.* at 28. Part of the specification also implied that the term “three-dimensional” is “interchangeable” with the term “depth,” but that “neither term is interchangeable with *stereoscopic* three-dimensional.” *Id.* at 29; see Pet. App.

II at 4 (“standard two-dimensional motion picture film \* \* \* may be converted \* \* \* so as to exhibit at least some three-dimensional or depth characteristics”). The Board also pointed out, see Pet. App. 32, the specification’s express recognition that “various techniques for specifying, encoding and viewing 3-D information may now, or come to, exist, which do not make use of parallax offset and/or left and right image pairs,” see Pet. App. II at 5. That recognition, the Board concluded, indicated that the term “3-D” as used in the ’294 patent extends beyond stereoscopic systems. Pet. App. 31-32.

In light of its conclusion that the ’294 patent used the phrase “three-dimensional image” broadly, rather than as limited to images with stereoscopic depth, the Board found that a number of claims in the ’294 patent were invalid because they were anticipated by the Falk and Oka patents. Pet. App. 39-55. The Board also sustained the examiner’s other claim rejections. *Id.* at 55-96.

Administrative Patent Judge Turner concurred in part and dissented in part. Pet. App. 99-102. Judge Turner agreed with the majority that the ’294 patent used the term “three-dimensional image” to refer to more than stereoscopic images. *Id.* at 100. He disagreed with the anticipation rejections based on the Oka and Falk patents, however, because he would have construed that term as used in the patent to refer to “images that appear to pop out of” the screen. *Id.* at 101-102. The Board majority concluded that Judge Turner’s interpretation was not properly “before the Board” because it had not been proposed by petitioner. *Id.* at 96.

4. The court of appeals summarily affirmed in an unpublished per curiam order. Pet. App. 157-158.

**ARGUMENT**

Petitioner asks this Court to determine when it is appropriate to limit the scope of a patent claim based on the patent's specification. Review of that question is not warranted in this case because the Board simply interpreted the relevant claim term according to its ordinary meaning. The Federal Circuit's summary affirmance does not conflict with any decision of this Court and does not warrant review.

1. a. The Board of Patent Appeals and Interferences applied the correct legal standard in determining what the term "three-dimensional image" means in patent '294, and the Federal Circuit correctly affirmed the Board's decision. In reexamining a patent that has expired, the Board applies claim-construction rules similar to those that courts apply—a practice petitioner does not appear to challenge. The Federal Circuit has instructed that courts (and, by implication, the Board) should ascertain the "ordinary and customary meaning of a claim term" from the perspective of a "person of ordinary skill in the art in question at the time of the invention." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (2005) (en banc). The court noted that "the person of ordinary skill in the art is deemed to read the claim term not only in the context \* \* \* in which the disputed term appears, but in the context of the entire patent, including the specification." *Ibid.*

When "the ordinary meaning of claim language as understood by a person of skill in the art" is "readily apparent," the task of claim construction "involves little more than the application of the widely accepted meaning of commonly understood words." *Phillips*, 415 F.3d at 1314. In such a case, the Federal Circuit has advised, "general purpose dictionaries may be helpful." *Ibid.*

When the meaning of a claim term is disputed, courts consult various contextual sources to determine the meaning, including “the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art.” *Ibid.* (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004)).

Applying those principles, the Board interpreted the phrase “three-dimensional image,” as used in Claim 1 of the ’294 patent, to extend beyond stereoscopic three-dimensional images. Pet. App. 23-39. The Board concluded—and petitioner did not contest—that the “plain (*i.e.*, ordinary and customary) meaning of ‘three-dimensional image’ \* \* \* includes non-stereoscopically produced images.” *Id.* at 26 & n.9. Ordinarily, that would be the end of the inquiry. As the Board noted, however, a claim term may be construed in a manner different from its ordinary meaning if, *e.g.*, a patentee “act[s] as his own lexicographer” by “clearly establish[ing] a definition contrary to the plain meaning of a term in order to narrow the term.” *Id.* at 25. Petitioner argued before the Board that it had done just that, relying on the specification to support its assertion that throughout the ’294 patent the terms “‘three-dimensional’ and ‘3D’ always mean stereoscopic 3D.” *Id.* at 26. The Board rejected that contention, explaining that the “specification of the ’294 patent does not support [petitioner’s] argument \* \* \* that 3-D always means stereographic.” *Id.* at 27-28; see *id.* at 28-39. In sum, the Board declined to import from the specification any limitation on the meaning of the disputed claim term, even though petitioner urged it to do so.

The Board’s conclusion that the specification did not contain the “stereoscopic” limitation is well supported. The specification observed, for example, that “various techniques for specifying, encoding and viewing 3-D information may now, or come to, exist, which do not make use of parallax offset and/or left and right image pairs.” Pet. App. II at 5. By expressly acknowledging that “3-D information” can be understood without left and right image pairs, the specification indicated that the term “three-dimensional image” encompassed more than stereoscopic images. The specification also discussed image improvements such as “3-D image elements created by 3-D photography and then entered into the computer as left- and right-image pairs, for example, or synthetic 3-D computer-generated graphics,” *id.* at 6, again suggesting that the term “3-D image” was not limited to stereoscopic images.<sup>2</sup>

b. Petitioner suggests (Pet. 8-19) that the relevant Federal Circuit precedents reflect substantial confusion about whether or when to narrow the meaning of a claim term based on the contents of a patent’s specification. Petitioner does not argue, however, either that the ordinary meaning of the term “three-dimensional image” is

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<sup>2</sup> Petitioner is incorrect in suggesting (Pet. 21) that the district court in the underlying patent litigation gave the ’294 patent a different construction. In a section of its preliminary injunction opinion entitled “Background,” the district court in passing equated the term “3D” with “stereoscopic.” Pet. App. 104. But nowhere in the opinion did the court purport to interpret the term “3D” or “three-dimensional” as used in the claims of the ’294 patent. See *id.* at 103-144. In any event, the district court’s opinion contained a careful disclaimer that its claim constructions were only “tentative” in light of the early stage of the case and the “relatively little amount of argument and evidence” that the parties had devoted to claim construction. *Id.* at 129 n.8.

limited to stereoscopic three-dimensional images, or that the specification in patent '294 provides a special definition of the term different from its ordinary meaning. Instead, petitioner suggests (Pet. 20-21) that the Board's conclusion must have been incorrect because it agreed with the examiner's final decision, which in turn agreed with the examiner's earlier initial decision. In petitioner's view, that sequence of events "exemplifies the incoherency of the Federal Circuit's precedents" because the applicable interpretive standard changed when the patent expired between the examiner's initial and final decisions. Pet. 20.

Petitioner is correct that, in light of the patent's expiration, the examiner was required in his final decision on reexamination to apply a standard different from the one that had previously applied. There is no indication, however, that the examiner failed to fulfill that obligation. In his initial decision, the examiner noted that he had "broadly interpreted" the disputed term. Pet. App. 155. Petitioner challenged the examiner's initial decision and the patent expired during the examiner's consideration of petitioner's objections, thereby foreclosing petitioner's ability to amend the patent to clarify the meaning of the disputed term. The examiner's subsequent decision did not purport to apply the "broadest reasonable construction" standard. Instead, the examiner construed the disputed term (including by consulting the specification) to determine its "proper and fair" meaning. C.A. J.A. 262; see *id.* at 261-285. The Board, in turn, explicitly declined to apply the "broadest reasonable construction" standard, and noted that it would instead apply claim-construction rules based on those that courts employ in infringement suits. Pet. App. 22-23.



Petitioner suggests (see Pet. 20) that the examiner must have applied the same standard in his initial and final decisions, and that the Board must have applied the same standard as well, because all three decisions reached the same conclusion. That assertion has no basis in law or logic. Particularly when (as here) the ordinary meaning of a term is broad and is not restricted by a patent’s specification, there is no reason to think that the standard applicable to the reexamination of an unexpired patent and that applicable to the reexamination (or challenge in court) of an expired patent would yield different conclusions. Rather than suggesting that the examiner or the Board conflated the relevant interpretive standards, the consistent results below reinforce the conclusion that the choice between those standards would not be outcome-determinative here.

2. Petitioner’s primary contention (Pet. 8-19) is that the Court should grant review to clarify how a court may use a patent specification in interpreting a disputed claim term. Relying on the pending petition for a writ of certiorari in *Retractable Technologies, Inc. v. Becton, Dickinson & Co.*, No. 11-1154 (Mar. 20, 2012)—in which this Court has invited the Solicitor General to file a brief expressing the views of the United States—petitioner argues that some Federal Circuit decisions have improperly imposed “stringent” restrictions on when a court will allow aspects of the specification to limit the meaning of claim terms. Pet. 16-18 (citing *Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, 632 F.3d 1246 (Fed. Cir. 2011); *Laryngeal Mask Co. v. Ambu A/S*, 618 F.3d 1367 (Fed. Cir. 2010); and *Marine Polymer Techs., Inc. v. HemCon, Inc.*, 672 F.3d 1350, 1369-1370 (Fed. Cir. 2012) (en banc) (opinion of Dyk, J.)). In other cases, petitioner argues, the Federal Circuit has been improp-

erly permissive in importing an “extraneous limitation” from the specification to limit the “clear language of a patent claim.” Pet. 18-19 (citing *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296 (Fed. Cir. 2011)).

There is no need for the Court to hold the petition in this case pending the disposition of the petition in *Retractable Technologies* because petitioner’s case would come out the same way regardless of how stringent or permissive a standard the court of appeals (or this Court) applied. The examiner and Board both looked to the specification—at petitioner’s urging—to determine whether the term “three-dimensional image” was limited to three-dimensional stereoscopic images. Both agreed unanimously that no such limitation could be found in the specification. Indeed, although petitioner asserts that the dissenting member of the Board employed “the appropriate reasoning,” even that member agreed that petitioner “cannot incorporate ‘stereoscopic’ or ‘stereographic’ into the limitation ‘3D’ in the claims.” Pet. App. 100. Petitioner would fare no better, however, if the claims of the ’294 patent were considered in isolation, since petitioner does not dispute that the ordinary meaning of “three-dimensional image” includes images that are made to look three-dimensional through means other than stereoscopic techniques. The adoption of strict limitations on use of the specification in construing disputed claim terms therefore could not assist petitioner’s cause.

3. Petitioner also argues (Pet. 22-28) that this Court should grant review to examine the contours of the “broadest reasonable interpretation” standard employed by the PTO during patent prosecution and during reexamination of an unexpired patent. This case would not

provide a suitable vehicle for clarifying that standard. The Federal Circuit decision of which petitioner seeks review was itself reviewing the decision of the Board. And the Board explicitly recognized that it would have been improper to apply the “broadest reasonable construction” standard here because the patent had expired during reexamination proceedings. Pet. App. 22.

Contrary to petitioner’s suggestion (Pet. 24-25), the examiner did not apply the “broadest reasonable construction” standard to the expired patent in his final determination. See C.A. J.A. 249-307. Rather, the examiner gave the term “three-dimensional image” a construction that he described as “broad” because he viewed that construction as the “proper and fair” one in light of the specification’s use of the term. *Id.* at 262; see *id.* at 261-285. The examiner applied the appropriate claim-construction analysis in concluding that the patent employed the term “three-dimensional image” in its ordinary broad sense and that the specification did not limit that ordinary meaning. Review of that conclusion is not warranted.

#### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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