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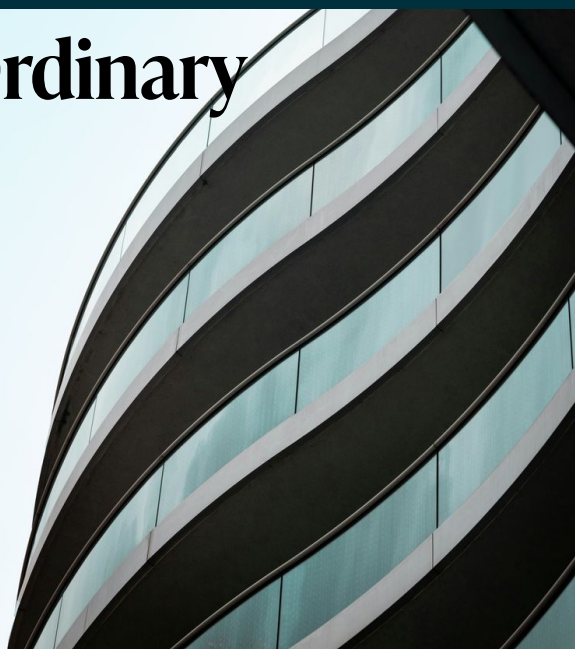
Alexa: What Is Plain and Ordinary Meaning?



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January 10, 2024, 3:45 PM
By: Ted Mathias

Is “milk” an *item,* or just a *word*? This question, among others, is set to be answered on January 12, 2024, as Freshub Inc. (Freshub) and Amazon.com, Inc. (Amazon) argue before the Federal Circuit (Nos. 22-1391, 2022-1425). A jury found that Amazon’s Alexa Devices do not infringe Freshub’s voice recognition patents. The key issue on appeal is the proper roles of the parties and the district court at trial when infringement turns on the meaning of a claim term that has not been construed. Must a party object to expert testimony about claim meaning or request claim construction in order to challenge an adverse jury verdict? And is it an error for a court to allow a jury to resolve the dispute based on expert testimony regarding the term’s meaning in view of its use in the patent?

The asserted claims recite a computer system that translates a digitized order to text, identifies an item corresponding to the text, and adds the identified item to a list associated with the user. These terms were not construed, and the district court instructed the jury to apply plain and ordinary meaning to all claim terms.

Freshub alleged that the accused devices infringed via Alexa’s shopping list feature, which allows users to add spoken words to a shopping list. Amazon’s fact witness, an engineer, testified that saying, “add milk to my shopping list” would result in “an item,” in this case milk, being added to the shopping list. But Amazon’s expert testified that the feature simply adds “text” to the list. There is no “item corresponding to the text” or an “identified item,” and

instead just text. In the expert's view, an "item" in this context had what he agreed was a "special meaning" – a tangible thing and not a word. The expert explained away the Amazon engineer's testimony as colloquial speech divorced from the context in which the asserted patent uses the word "item." Freshub did not object to this testimony or ask the district court to construe the term "item." Amazon contends that this constituted waiver.

Freshub argues that the expert's use of a "special meaning" was improper in the absence of any claim construction and in view of the district court's instruction to apply plain and ordinary meaning to all claim terms. It is surely correct that a jury should not be tasked with determining plain and ordinary meaning, as Amazon argues, "read in the context of the claim, specification, and prosecution history." The court – not the jury – is charged with, for example, plumbing the depths of the prosecution history to determine whether a claim term should be given some special meaning. But here, the claim plainly distinguishes an "item" from "text," and there was trial evidence that Alexa could add "arbitrary spoken words," such as the word "sad," to a user's shopping list, which would not be considered an "item" in ordinary usage. This evidence strengthens Amazon's argument that the additions to the shopping list are mere text rather than "items corresponding to text."

Perhaps the most likely outcome is that the Federal Circuit will affirm after finding harmless error: the district court should have construed "item," but the word's usage in the claims dictates that Amazon's expert correctly opined that "identify[ing] an item corresponding to the text" requires more than adding the text to a list. Listen to the January 12 oral argument to find out!

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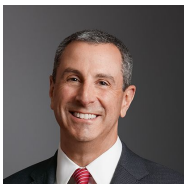

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