

15-1293

**United States Court of Appeals
for the Federal Circuit**

RICKY D. HANGARTNER.,
Plaintiff – Appellant,

v.

INTEL CORPORATION, INC.,
Defendant – Appellee.

*Appeal from the United States District Court from the District of Oregon
in Case No. 13-cv-00141, Judge Michael W. Mosman*

**REPLY BRIEF OF PLAINTIFF – APPELLANT
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August 6, 2015

CERTIFICATE OF INTEREST

Counsel for Appellant Ricky Hangartner, certifies the following:

1. The full name of every party or amicus represented by me is:

Ricky D. Hangartner.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Ricky D. Hangartner.

3. The parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public, of the party or amicus represented by me are:

None.

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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Respectfully submitted,

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I. INTRODUCTION

The District Court adopted Intel's proposed construction of "all of the multiple logic elements" rather than Dr. Hangartner's proposed construction of "all of the one or more logic elements."¹ As set out in Dr. Hangartner's Principal Brief, the District Court erred by improperly promoting a rule of grammar regarding the plural nature of the term "logic elements" in the latter part of the claim. Intel has now responded challenging Dr. Hangartner's position. However, Intel's arguments are unavailing for several reasons.

First, the claim language itself compels Dr. Hangartner's construction. Only Dr. Hangartner's proposed construction results in a whole claim that is completely internally consistent. Still further, Dr. Hangartner's proposed construction comports with well established patent drafting and construction conventions while Intel's proposed construction contradicts them.

Second, the specification of the '422 Patent explicitly discloses the embodiments that Intel denies exist. Only Dr. Hangartner's proposed

¹ As with Dr. Hangartner's Principal Brief and Intel's Principal Brief, the parties are using the term "logic elements" as synonymous with the term "nondeterministic logic elements" for ease of reading. No substantive difference between the two terms is intended.

construction results in a properly-construed claim that covers not only the preferred embodiment, but also the alternative embodiments disclosed by the '422 Patent.

Third, nothing in the prosecution history contradicts Dr. Hangartner's position. Intel's argument that merely adding a "synchronization means" necessarily transformed "one or more" into "two or more" is without merit. Although the claim was amended during prosecution, nothing in those amendments or prosecution arguments even touched on the number of logic elements that must be present in the claim.

Finally, Intel acknowledges that "the overall claim language and specification are controlling over mechanical rules of grammar." Intel Brief at 34. However, Intel's entire argument is founded on nothing except a mechanical rule of grammar: Just because the word "logic elements" is plural in one location in the claim somehow means that there must be "two or more" and this Court should ignore the rest of the claim language. Dr. Hangartner urges this Court to reject such simplistic reliance on mechanical rules of grammar, and instead to

analyze the actual claim as a whole, in view of the actual disclosure of the '422 Patent and its file history.

II. Reply To Intel's Arguments

In the District Court below, the parties proposed competing constructions for the term “all of the logic elements.” The parties disagreed whether the term should be construed as “all of the *one or more* logic elements” [Dr. Hangartner] or “all of the *multiple* logic elements” [Intel]. The District Court adopted Intel's proposed construction for two reasons: The District Court reasoned that the word “logic elements” being plural suggested that two or more logic elements would be necessary, and that the prosecution history suggested that construction.

In its principal brief, Intel urges this Court to affirm the District Court's construction. However, Intel's arguments are unavailing and do not adequately address the error with the District Court's construction. As set out below, the District Court's construction should be vacated, and Dr. Hangartner's proposed construction should be adopted.

A. The Claim As A Whole Compels Dr. Hangartner’s Proposed Claim Construction

In his principal brief, Dr. Hangartner demonstrated that his proposed construction (“all of the *one or more* logic elements”) is compelled by common patent claim drafting conventions and ordinary rules of grammar.

1. “All of the *One Or More* Logic Elements” Is A Perfectly Acceptable And Common Claim Format

Intel erroneously argues that the word “all” preceding “one or more”, as proposed by Dr. Hangartner, would render the claim syntactically incorrect. Intel states there “would be no need to specify that the synchronization means be coupled to ‘all of the’ logic elements, if the circuit included only one element.” Intel Brief at 26. Intel’s statement is wrong. Again, when the term “one or more” in a patent claim is followed by a noun, that noun is always plural even though it includes the singular. Likewise, where, as here, a claim term is introduced as “one or more” [plural noun], later reference to the possibility that there are multiple instances of that claim term should be (and very commonly is) made in the form “all of the one or more” [plural noun]. More simply, drafting a claim term with the form “one or more [plural noun]” may be properly referred to later in the claim as “all

of the one or more [plural noun].” There is nothing either inconsistent about that form, nor does that form necessitate that there be “two or more” [plural noun]. In short, the claim structure “all of the one or more [plural noun]” necessarily includes “one [singular noun].”

To put this issue in context, a cursory search of the records of the U.S. Patent and Trademark Office reveals that the claim structure “*all of the one or more* [plural noun]” is incredibly common. For instance, this Court can take judicial notice that such claim form is present in the following issued patents and published patent applications which were turned up with a trivial 30 second search of the patent office records:

<u>Patent/Publication</u>	<u>Location</u>	<u>Language</u>
8,271,393	Claim 1	all of the one or more electronic documents
6,348,648	Claim 30	all of the one or more other computerized music display devices
8,798,374	Summary	all of the one or more predefined facial actions
8,938,379	Claim 3	all of the one or more segments
20120151358	Claim 1	all of the one or more computing resources
20150009990	Abstract	all of the one or more conditions
20140181704	Claim 1	all of the one or more of the services
8,151,909	Description	all of the one or more motors
6,055,548	Claim 17	all of the one or more cells

<u>Patent/Publication</u>	<u>Location</u>	<u>Language</u>
6,596,148	Description	all of the one or more organic contaminants
6,571,287	Description	all of the one or more local DSCs
8,342,609	Claim 1	all of the one or more measured borehole conditions
20150193071	Abstract	all of the one or more first critical nodes
8,361,171	Description	all of the one or more microbial agents
20060036152	Claim 14	all of the one or more brain maps
2011016023	Claim 23	all the one or more challenges
8,091,728	Claim 5	all the one or more fill openings
8,397,170	Claim 11	all the one or more selectable thumbnail images
6,845,474	Claim 1	all the one or more detected problems
20150212925	Abstract	all the one or more specified fields
8,265,945	Claim 12	all the one or more emulatable aspects
8,707,163	Claim 6	all the one or more barcode images

In addition, a simple search of the Patent Office records reveals that of the nine million or so issued patents, approximately *two million* include language of the form “one or more [plural noun]”. In other words, should this Court endorse Intel’s argument and affirm the District Court’s holding that “all the multiple logic elements” is the only proper construction (rather than “all the one or more logic elements), over *two million* other issued patents will have the scope of their claims

instantly transformed from “one or more” to “two or more” just because those words are followed by a plural noun.

2. The Current Claim Construction Renders The Claim More Ambiguous Than It Was Before

The District Court’s construction – requiring multiple logic elements despite the plain language reciting one or more logic elements – creates ambiguity where before there was none, yet does not eliminate any other ambiguity. More specifically, the District Court acknowledged that the claim language envisions a circuit having “one or more” logic elements. (A0010)(“[t]he language in preceding paragraphs seems to contemplate a logic circuit that could consist of a single logic element”). However, the District Court still adopted a construction that contradicts exactly what the District Court found to be contemplated by the claim, thus creating the first ambiguity.

Second, and perhaps more problematic, the claim as construed requires a circuit with more than one logic element, yet the earlier elements of the claim require one logic element for each of “one or more variables”. See claim 1, *infra*. Thus, it is now ambiguous whether a circuit having two logic elements used to solve a single-variable problem would infringe the claim. In other words, if the claim requires “*one* logic

element for each variable”, and a single-variable problem is presented (e.g., “I need one random bit”), it is unclear whether a two-logic element circuit would read on that claim. Accordingly, the District Court’s claim construction did not resolve any ambiguities in the claim. Rather, the claim as now construed includes terms that disagree with each other.

A claim construction that is in disagreement with the plain language of the claim is rarely if ever correct. See *Neomagic Corp. v. Trident Microsystems, Inc.*, 287 F.3d 1062, 1075 (Fed. Cir. 2002). So it is in this case: The District Court’s construction renders the claim inconsistent and ambiguous. Accordingly, it should be vacated and Dr. Hangartner’s proposed construction should be adopted.

3. The First Instance Of A Term Is More Important To Construction Than Subsequent Instances

Intel characterizes Dr. Hangartner’s argument as being this: The “one or more logic elements” construction should prevail because the words “one or more” come first in the claim. Intel suggests that argument is nonsensical. Intel is wrong.

The very concept of antecedent basis turns completely on where a term appears for the first time in a claim. In other words, when considering how to construe a claim term that begins with the word

“the”, one must *necessarily* look earlier in the claim for the term’s antecedent basis. See, e.g., *Energizer Holdings Inc. v. Int’l Trade Comm’n*, 435 F.3d 1366 (Fed. Cir. 2006)(discussing requirement of antecedent basis); *Papyrus Technology Corp. v. New York Stock Exchange, Inc.*, 581 F.Supp.2d 502, 533 (S.D.N.Y. 2008)(“To construe the plain meaning of the language at issue, the court must determine the antecedent basis of the word ‘said’ in the phrase.”).

Based on long-established law, the courts must look to the earliest instances of a claim term that is preceded by the word “the” when construing that term, for it is the antecedent basis of the term that most greatly influences its construction. Accordingly, Intel’s argument – that this Court should look at the *last* instance of a claim term to determine what the antecedent basis means – is itself contrary to the law and should be rejected. See, e.g., *Baldwin Graphic Systems, Inc. v. Siebert*, 512 F.3d 1338, 1342-43 (Fed. Cir. 2008)(“Because the *initial* indefinite article (‘a’) carries either a singular or plural meaning, any *later* reference to that same claim element merely reflects the same potential plurality.”)(emphasis added).

B. The ‘422 Patent Specification Explicitly Discloses The Single Logic Element Embodiment

In its opposition, Intel erroneously argues that the ‘422 Patent specification only discloses an embodiment that uses *multiple* logic elements. That statement is flatly untrue. The truth is that the ‘422 Patent explicitly discloses alternative embodiments based on a *single*-logic element embodiment.

1. The Single Logic Element Embodiment Is Disclosed In At Least Two Locations Within The Specification

Contrary to Intel’s position, the ‘422 Patent includes at least two references to embodiments that make use of a single logic element. Accordingly, the claim should be construed to cover that embodiment absent some clear disavowal of claim scope, which has not happened. *Oatey Co. v. IPS Corp.*, 514 F.3d 1271, 1276 (Fed. Cir. 2008)(“We normally do not interpret claim terms in a way that excludes embodiments disclosed in the specification.”).

First, the ‘422 Patent discloses that “[i]n a practical implementation in an integrated circuit, individual [logic] elements *could be* grouped, for example in groups of 8 or 16 such elements” Col. 8, lines 10-15; A047 (emphasis added). By disclosing one “practical implementation,” Dr. Hangartner is undeniably discussing only the

preferred embodiment of his invention, not the exclusive embodiment. See *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 906 (Fed. Cir. 2004) (“[T]his court has expressly rejected the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment”). In addition, by stating that one circuit *could* group logic elements, he is necessarily also stating that another circuit *might not* group them, and thus use only *one* logic element. Accordingly, this passage at least implicitly discloses the single-logic element embodiment.

Second, Intel apparently overlooked the portion of the ‘422 Patent specification entitled “Alternative Embodiments.” Col. 12, lines 16-33; A049. In that portion, Dr. Hangartner describes *exactly* the embodiment that Intel argues does not exist.

Intel accurately identifies portions of the specification that discuss the use of multiple logic elements operating in *parallel* to generate values for multiple variables in a multi-variable problem. Intel Brief at 8, line 4; at 41, line 1. However, Intel conveniently omits any reference to the “Alternative Embodiments” section in which the ‘422 Patent makes explicit reference to an alternative embodiment where *one* logic

element is used to *serially*-generate multiple variables for a multi-variable problem. More specifically, the specification discloses that in one “alternative embodiment, individual clauses or even parts of clauses may be evaluated *serially* due to memory and gate density limitations.” Col. 12, lines 20-25; A049 (emphasis added). In short, Intel argues that the specification discloses only multiple-logic element embodiments by conveniently ignoring the alternative embodiment that uses only *one* logic element.

Thus, the ‘422 Patent specification explicitly discloses an alternative embodiment where *one* logic element is used to serially generate multiple variables for use in a multi-variable expression. Intel’s arguments to the contrary are simply wrong, and the claim should be construed to also cover the single-logic element embodiment.

2. The District Court Agreed With Dr. Hangartner And Rejected Intel’s Position On This Issue

Intel accuses Dr. Hangartner of having ignored Intel’s position on whether the specification discloses a single-logic element embodiment. Intel Brief at 39. But Dr. Hangartner did not discuss the alternative embodiments in his brief because the District Court agreed with him. In its Claim Construction Order, the District Court concluded that the ‘422

Patent discloses a one-to-many embodiment where a *single logic element* is used to generate values for multiple variables. A015-016 (District Court adopting Dr. Hangartner's construction that a single logic element can be used to provide values for multiple variables). Intel is apparently the only one unaware that the single-logic element embodiment is in fact disclosed in the '422 Patent.

3. Dr. Hangartner's Proposed Construction Is The Only Legally-Appropriate One

A claim construction that excludes disclosed embodiments is normally the wrong construction. *Oatey Co. v. IPS Corp.*, 514 F.3d 1271, 1276 (Fed. Cir. 2008) (“We normally do not interpret claim terms in a way that excludes embodiments disclosed in the specification.”). Indeed, unless the specification or prosecution history clearly disavows an embodiment, it is reversible error to construe that embodiment out of the claim. *Id.* at 1277 (improper to construe claim to exclude embodiments absent clear disclaimer)(numerous citations omitted).

As just explained, and contrary to Intel's position, the '422 Patent *explicitly* supports the single-logic element embodiment. The District Court's construction, based on an erroneous linguistic analysis of a plural noun, excludes the single-logic element embodiment. Accordingly,

unless there was a “clear disavowal” of claim scope (which there was not), the District Court’s construction is wrong and should be vacated.

C. The Prosecution History Does Not Suggest A Different Result

It is helpful to first recap what occurred during prosecution of the ‘422 Patent. The table below breaks the asserted claim (Claim 1) of the ‘422 Patent into two parts (“Part A” and “Part B”) based on the prosecution history of Claim 1.

<u>Parts of Claim 1</u>	
<p>“Part A”</p> <p>Original</p>	<p>1. A nondeterministic logic circuit for generating random boolean values of one or more variables as a proposed solution to a computing problem expressed in conjunctive normal form as one more clauses in said one or more variables, the logic circuit comprising:</p> <p style="padding-left: 40px;">one nondeterministic logic element for generating a respective random boolean value for each one of the said one or more variables; and</p> <p style="padding-left: 40px;">each nondeterministic logic element comprising:</p> <p style="padding-left: 80px;">a cross-coupled pair of transistor inverter circuits;</p> <p style="padding-left: 40px;">means for controlling power to the cross-coupled pair of transistor inverter circuits; and</p> <p style="padding-left: 40px;">means for equalizing charge on the gates of the transistor inverter circuits while power is removed from the cross-coupled pair, thereby driving the cross-coupled pair to an unstable equilibrium, whereby intrinsic circuit noise will cause the cross-coupled pair to randomly assume</p>

	one of two stable states when power is restored to the cross-coupled pair, the stable state assumed by the cross-coupled pair providing a probabilistically selected random boolean value
“Part B” Added	and further comprising common synchronization means coupled to all of the nondeterministic logic elements for synchronizing operation of the nondeterministic logic elements.

Both parties and the District Court are all in agreement that everything in Part A of Claim 1 undeniably covers a single-logic element embodiment. Intel Brief at 15-16 (Intel arguing that only after adding Part B to the claim did it require more than one logic element); A015-016 (District Court acknowledging that everything in Part A reads on a single-logic element embodiment). Accordingly, the District Court’s claim construction hinges on whether Dr. Hangartner’s amendment to add Part B to the claim constitutes a clear indication that more than one logic element is necessary. It does not.

Part B of the claim recites a “synchronization means” coupled to the one or more logic elements. It is the “synchronization means” that resulted in allowance of the claim, not the plural word “elements.”

1. Synchronization Of *One Or More* Logic Elements Is All That Was Added During Prosecution

Intel argues that synchronization necessarily requires two or more components. Intel Brief at 24. That is true. But that does not mean synchronization necessarily requires two or more logic elements. Indeed it does not; even one single logic element should still be synchronized. Dr. Hangartner already discussed how the specification supports the synchronization of even a single-logic element embodiment. See Hangartner Opening Brief at 17-18. But even further, common sense in view of the specification urges the same result.

Dr. Hangartner's invention functions as an accurate random number generator because cross-coupled inverters will fall into one of two determinate states randomly. In other words, each of *two* inverters is forced to an indeterminate state, and thermal noise will cause them both to adopt one of two determinate states. Col. 7, lines 60-65; A047. However, the best way to ensure that the *two* cross-coupled inverters assume a random state is to ensure that their operation (turning them on) is synchronized. In other words, if the *two* cross-coupled inverters in *one* logic element are not synchronized, then one of the two inverters

may tend to adopt a determinate state faster than the other one, thereby diminishing the randomness of the entire circuit.

Thus, synchronizing one logic element is not only possible, but indeed it may be more necessary to synchronize the two inverters in one logic element than it is to synchronize multiple logic elements. Accordingly, Intel's argument that one logic element cannot be synchronized is simply without merit.

2. None Of The Statements Made During Prosecution Suggest *Multiple* Logic Elements Are Necessary

Intel points to one statement made during prosecution for the proposition that Dr. Hangartner limited the claim scope to more than one logic element to overcome the cited art. Intel drastically overstates what was said. More specifically, Intel cites one statement made by Dr. Hangarter to the Board of Patent Appeals and Interferences:

includ[ing] essentially two elements: (a) one non-deterministic logic element for each variable, to generate a random boolean value for the corresponding variable; and (b) a 'common synchronization means' that synchronizes operation of the nondeterministic logic *elements*. *They* have to be synchronized because each guess at a solution to the problem requires that a random value be picked *for every variable* in the problem.

Intel Brief at 15-16.

The weakness of Intel's argument lies in the fact that it is nothing but circular reasoning. More specifically, the quoted passage is just a restatement of the actual claim language. Intel's argument is that using the words "logic elements" to describe the words "logic elements" somehow supports the term "two or more." Intel's argument simply makes no sense. Rather, nothing in the cited passage alters anything except that every one of the undeniably one or more variables requires a random value. That does not change or even touch upon the plain fact that the claim still, by its very terms, requires no more than *one* variable. See claim 1.

Still further, Intel's argument flatly ignores the first few words of the passage, that claim 1 "includes essentially *two* elements": *one* logic element and a synchronization means. Dr. Hangartner did not say that claim 1 "includes essentially *multiple* elements." Of course not, because claim 1 does not. Only *one* logic element is needed.

3. The Claim Was Not Amended To Overcome Prior Art, and Thus No Claim Scope Was Disavowed

Intel erroneously argues that Dr. Hangartner was required to amend the claim during prosecution and change its scope from "one or more logic elements" to "multiple logic elements" to recite patentable

subject matter. That argument would only be interesting if it were true. Dr. Hangartner did not amend the claim to overcome prior art that taught a single-logic element invention; indeed, Dr. Hangartner did not amend the claim to overcome any prior art at all. Rather, the claim was rejected for double-patenting. Intel Brief at 14.

Had the claim been rejected over prior art that taught a single-logic element invention, Intel's argument might have some merit. But it was not. There were no single-logic element inventions cited against Dr. Hangartner's claim that he had to overcome. Indeed, the only invention Dr. Hangartner was required to overcome was his own! Thus, there is nothing special about the plural nature of the word "elements" in Part B of the claim vis-a-vis any prior art. In other words, Dr. Hangartner did not make any amendments or statements during prosecution to overcome any prior art at all, only his own invention. Accordingly, no disavowal of claim scope occurred.

III. CONCLUSION

The District Court improperly concluded that the term "one or more logic elements" actually means "multiple logic elements." The plain language of the claim and the '422 Patent reveal that a minimum

of one logic element is required, not two. Nothing in Intel's principal brief alters that result. Accordingly, Dr. Hangartner respectfully requests that the District Court's claim construction order be vacated as to that finding, and remand this case for further proceedings.

Dated: August 6, 2015.

Respectfully submitted

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**United States Court of Appeals
for the Federal Circuit**

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RICKY D. HANGARTNER.,

Plaintiff – Appellant,

v.

INTEL CORPORATION, INC.,

Defendant – Appellee.

CERTIFICATE OF SERVICE

Being duly sworn according to law, and being over the age of 18,
upon my oath I depose and say that:

On the date indicated below, I electronically filed the foregoing
with the Clerk of the Court for the United States Court of Appeals for
the Federal Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF
users and that service will be accomplished by the appellate CM/ECF
system.

Dated: August 6, 2015.

/s/ John Whitaker
John Whitaker

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

This brief contains 3714 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(B)(iii) and Federal Circuit Rule of Appellate Procedure 32(b). The word count was performed by the automated word-counting function of counsel's word processing software.

This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5,6). This brief has been prepared in a proportionally spaced typeface using LibreOffice in a 14 point "Century Schoolbook" font.

Dated: August 6, 2015.

Respectfully submitted,

/s/ John Whitaker
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