

**THE REACH OF LITERAL CLAIM SCOPE INTO  
AFTER-ARISING TECHNOLOGY:  
ON THE CONSTRUCTION OF THINGS AND MEANINGS**

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Literal claim scope commonly encompasses after-arising technology (“AAT”), and the reach of a claim into AAT is a critical variable in any attempt to fine-tune the reward for invention that patents offer. Yet, the contemporary doctrine addressing how far literal claim scope can reach into AAT is radically incomplete. Judicial decisions sanctioning or denying the reach of literal claim scope into AAT are today “black boxes”—we know what goes in and what comes out, but the reasoning that determines the outcomes is hidden from view (perhaps even to the judges themselves).

This paper opens the black boxes of the disclosure and claim construction analyses. It explains two decisions that courts necessarily make, consciously or not, when they decide whether or not to sanction the reach of literal claim scope into AAT but that are not reflected in patent doctrine. Drawing from the philosophy of things and the philosophy of language, it demonstrates that courts dealing with allegations of infringing AAT implicitly construct both the things disclosed by a patent (by labeling the things’ properties as either intrinsic or extrinsic) and the meaning of the language used to describe those things (by opting for either a denotational/extensional or ideational/intensional theory of meaning<sup>1</sup>). Furthermore, the manner in which a court constructs things and meanings is often outcome dispositive: it determines whether the fixed scope of a literal claim can encompass the AAT in question.

Patent doctrine should recognize the instrumental role that the construction of things and meanings plays in validity and infringement determinations when the allegedly infringing technology is AAT. Things and meanings are not entities that have definitive metaphysical or even conventional groundings; they are “policy levers” that courts already use to shape the reach of literal claim scope into AAT. Courts should openly acknowledge the discretion that they have to date exercised, again consciously or not, within the black box. Context-sensitive rules that guide the construction of things and meanings could both increase predictability and sculpt the reach of literal claim scope into AAT so as to further the normative goal of providing optimal incentives for invention.

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<sup>1</sup> The distinction between ideational and denotational meaning is not the commonly discussed distinction between plain meaning and meaning in the context of the specification.