

Fed. Circ. In February: When Grammar Trumps Patent Specs

By **Jeremiah Helm and Sean Murray** (March 26, 2026)

This article is part of a [monthly column](#) that highlights an important recent patent appeal. In this installment, we examine the Federal Circuit's ruling in [Netflix Inc. v. DivX LLC](#).

In casual conversation, we do not always put modifiers in the right place. This creates ambiguity. When we learn that the dog jumped on the bed covered in mud, it is unclear whether the bed or the dog was the muddy one.

We typically resolve such ambiguity by context. Dogs are far more likely to be covered in mud, at least as compared to beds. Thus, it is safe to assume that "covered in mud" describes the dog and not the bed, even though the modifier comes immediately after "bed." The modifier is misplaced — it should be next to dog — but context provides the needed clarity to understand the meaning.

Patent claims, however, articulate complicated technological ideas.

With complicated technological concepts, it may not be so clear whether a modifier is misplaced or not. In fact, two interpretations of the claim language may be equally plausible. That is the situation that the [U.S. Court of Appeals for the Federal Circuit](#) addressed in its Feb. 13 [decision](#) in *Netflix Inc. v. DivX LLC*.

The patent at issue in *Netflix* was generally directed to streaming encrypted video and providing information about what portions of the video were encrypted. The disputed claim limitation in *Netflix* recited: "locating encryption information that identifies encrypted portions of frames of video within the requested portions of the selected stream of protected video."

This phrase is susceptible to two different interpretations. The first interpretation, advanced by *DivX*, is that the encryption information must be located "within the requested portions of the selected stream of protected video." Using this interpretation, the [Patent Trial and Appeal Board](#) affirmed the patent's validity.

The second plausible interpretation, advanced by *Netflix*, was that the word "within" modifies its immediate antecedent — the "encrypted portions of frames of video." Under



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this view, encryption information must identify "encrypted portions of frame of video within the requested portions of the selected stream," but that encryption information could be located elsewhere in the file structure, not necessarily within the requested portions.

The parties did not dispute that under Netflix's interpretation, the limitation was disclosed in the prior art, thereby undermining the board's holding regarding the patent's validity.

The Federal Circuit recognized that the modifier "within the requested portions of the selected stream of protected video" could modify either "encrypted portions of frames of video," as Netflix proposed, or it could modify "encryption information," as DivX would have it. Either reading was possible, and unlike the situation with the dog, bed and mud, neither possibility could be excluded as obviously wrong.

To resolve the situation, the Federal Circuit looked to precepts of English grammar and found a long-established "general interpretive principle that applies to this very situation ... that (where commas or other textual signals are not used) the modifier is presumptively understood to be tied to the nearest available semantically plausible modificand."

The Federal Circuit deemed this nearest-available-modificand rule a default principle that created a presumptive interpretation for the claim. In this instance, the nearest available modificand was the "frames of video," which augured for Netflix's proposed interpretation. But, because the nearest-available rule is only a presumption, the court explained, the analysis must continue to determine "if there are good indications that a contrary interpretation is the better one."

The court first examined the remainder of the claim and concluded that it did not require deviating from the nearest available interpretation. The court did not hold that the remaining claim language excluded DivX's interpretation. Instead, the court explained, Netflix's interpretation created a coherent whole in combination with the subsequent limitations and therefore did not undermine the grammatical presumption. Thus, there was not a sufficiently good indication that DivX's contrary interpretation was better than the default.

The court then examined the specification. The court acknowledged that the specification included several embodiments where the encryption information was within the requested portions of the selected stream of protected video. But that was not enough to overcome the presumption because the specification did not limit the invention to just that arrangement.

Instead, the specification indicated, without elaboration, that other arrangements, with the encryption information located elsewhere, were possible. Although the "most fully elaborated embodiments describe a location of encryption information ... within the requested portions of video," in line with DivX's construction, this was not enough to demonstrate the feature was required in the invention.

Thus, the court concluded, the specification did not overcome "the presumptive interpretation of the claim language established by the grammar precept."

Netflix is notable because it develops a new presumption to apply during claim construction. There are many different presumptions that courts may apply when construing claims, with some more persuasive than others.

For example, a relatively strong presumption in claim construction is that the same word is used consistently to mean the same thing throughout the patent's claims. Claim differentiation — the presumption that different claims have a different scope — can be strong in some situations and weak in others.

The presumption that claims should be construed to preserve their validity is relatively weak and not often applied. The nearest-available-modificand presumption, at least as applied in Netflix, seems to be at the stronger end of the spectrum.

Netflix's grammatical presumption is interesting because it deemphasizes the specification's disclosure. Claims are construed in view of the specification, and here the court acknowledged that DivX's interpretation tracked the specification's most fully elaborated embodiments.

The specification's focus on embodiments with encryption information in the stream would typically provide good supporting evidence for DivX's interpretation, and suggest any ambiguity should be resolved to conform with those fully elaborated embodiments. Nevertheless, the nearest-available-modificand presumption governed because the specification did not exclude other arrangements.

Netflix has takeaways relevant to both patent drafters and patent litigants.

First, during patent drafting, avoid misplaced modifiers that might create ambiguity. Place modifiers as close as possible to the modificand or, if necessary, use commas or additional

context to clarify the meaning.

Second, do not count on the specification to clarify a misplaced modifier in the claim language.

Finally, be aware of grammatical rules that may provide a default interpretation for the claim language. Netflix addresses one such rule, but the idea that grammar may trump the patent's disclosure can apply to other grammatical rules as well.

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