

Patent Drawings and the USPTO's Electronic Framework

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Significant numbers of patent applications are being filed with drawings in data formats that result in a patent having degraded images. This is a result of failure of users of the United States Patent and Trademark Office's (USPTO's) Electronic Filing System (EFS) to understand the following provisions of the USPTO's Legal Framework for EFS-Web, published at 74 FR 55200 (2009). See my prior article on the Framework, "Review of Legal Framework for Electronic Filing System Web (EFS-Web), 74 FR 55200-211 (2009)," at http://www.neifeld.com/pubs/2009_reviewefsweb.pdf

The Framework, at 74 FR 55208 states in relevant part, with emphasis supplied, that:

EFS-Web supports the use of black and white, color, or grayscale images within the PDF document. However, grayscale or color images filed as "drawings—other than black and white line drawings" in a utility patent application ***will be converted to black and white images when stored into IFW. The quality of black and white images may be degraded.***

Moreover, the USPTO's EFS file validation rules do not reject or warn the user that drawings the user uploaded to EFS in other than "black and white image[]" format, will be "converted to black and white images... [and] ... may be degraded" as a result of the conversion.

Part of the users confusion is that the Framework does not define its use of the term "black and white". While that may be a term of art for graphic designers, to a lay person, it means anything that appears to lack color. As a result, EFS filers that see drawings that appear to lack color, file the drawings with the expectation that what they see is what they will get in their patent. Not so!

What the USPTO means by "black and white images" is a bitonal black and white image; each pixel is either black or white; 1 bit of color depth. That is not the same as an image in a color format that appears to be black and white. That is not the same as an image in a grayscale format that appears to be black and white. What the USPTO means by "black and white" is a different data format from color and grayscale formats.

The results of USPTO rendering of drawings to black and white varies, but uniformly involves loss of image information. This can result in loss of rights.

Patents are generally only enforceable as issued. See 35 USC 255, 256. Southwest Software, Inc. v. Harlequin Inc., 226 F.3d 1280, 1294, 56 USPQ2d 1161, 1174 (Fed. Cir. 2000); and Central Admixture Pharmacy Services, Inc. v. Advanced Cardiac Solutions, P.C., 482 F. 3d 1347, 1353 (Fed. Cir. 2007)(discussing whether, when, and the impact, of corrections of errors, on litigation). Therefore, it is the issued patent drawings that count. Design patent rights necessarily depend upon the figures. For utility patents, enablement, written description, and claim scope may depend upon the drawings. Most patent applications are filed using EFS. Therefore, this issue impacts the rights of a large class of patents.

In order to prevent loss of rights, users of EFS should ensure that they know the consequences of EFS filing of images, and how to file images using EFS without losing information.

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