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The Court hereby finds the term “wherein the test unit is provided for calculating and storing statistical data processes, after receiving the data  $a_{ijT}$  corresponding to the space at an instant T, a content of the analysis memory in order to update the output memory of the analysis output” of claim 3 of the ’293 patent to be **indefinite**.

**D. “configured to determine the data in the histogram that satisfy a selected criterion”**

<u>Plaintiff’s Proposed Construction</u>	<u>Defendant’s Proposed Construction</u>
“configured to determine the data to be included in the histogram based on satisfying a selected criterion”	Indefinite  Alternatively, plain meaning

The disputed term “configured to determine the data in the histogram that satisfy a selected criterion” appears in claims 18 and 22 of the ’293 patent.

**(1) The Parties’ Positions**

Plaintiff argues that claims 18 and 22, taken as a whole, make clear that the above phrase recites the function of classification for determining the content of the histogram. *See, e.g.*, Dkt. No. 133, Plaintiff’s Opening Claim Construction Brief, at page 14. Plaintiff argues that the surrounding claim language recites an “input portal” which is coupled to the “classification unit” which outputs to the “coincidence unit” which generates an enable signal for the “histogram unit” which generates the histogram. *Id.* Thus, Plaintiff argues, the order of operations is clear. *Id.* Plaintiff also argues that in the context of the claim as a whole, this term must refer to determining the parameter data from the input portal to be included in the histogram based on a selected criterion.

Defendant argues that according to the claim language, data is added to the histogram based on the classification's unit output, but that the claim requires the output to be based on data *already in the histogram*. *See, e.g.*, Dkt. No. 138, Defendant's Responsive Claim Construction Brief, at page 14. Defendant argues that this claim language is nonsensical because the classification unit cannot evaluate data "in the histogram" given that another limitation requires that the result of this calculation is used to create the histogram in the first place. *Id.* Defendant argues that the term is indefinite and Plaintiff's "fix" is to rewrite the claims. *Id.* Defendant argues that the claims may not be redrafted to cure drafting errors. *Id.* If the term is not indefinite, Defendant argues that the term simply should be given its plain meaning and not be rewritten. *Id.* at 14-15.

In its Reply, Plaintiff argues that this limitation is not indefinite because a person of skill in the art would understand that it describes the function of a classification unit—determining which data to be included in histogram calculation—consistent with the surrounding claim language and all embodiments of classification units in the specification. *See, e.g.*, Dkt. No. 148, Plaintiff's Reply Claim Construction Brief, at page 3.

## **(2) Analysis**

The parties dispute whether the claim should be rewritten to insert the phrase "to be included" in the disputed term to otherwise avoid a nonsensical result. Both parties seem to agree that the claim as written is nonsensical. Thus, Defendant argues that the claim is either indefinite or has its plain meaning (which would in effect be a nonsensical claim). Plaintiff argues that the language "to be included" is not a rewrite because one of skill in the art reading the claim would necessarily understand the term "in" to mean "to be included in."

The disputed term is located within claims 18 and 22 of the '293 patent. Claim 18 is reproduced below in relevant part

a classification unit coupled to the input portal and the histogram unit, and **configured to determine the data in the histogram that satisfy a selected criterion**, and to generate an output accordingly, the classification unit supplying the output to the transfer bus;

(emphasis added.) Similar claim language appears in claim 22. In the limitations recited in the claim, the “histogram unit” calculates a histogram for the selected parameter, the “classification unit” determines the data in the histogram that satisfy a selected criterion, and the “coincidence unit” receives output from the classification unit and generates an enable signal for the histogram unit. In other words, in one portion of the claim, data is added to the histogram based on the classification unit’s output, but in another portion of the claim the output from the classification unit is based on data already in the histogram.

Based on the claim language as written, both parties recognize that there is a problem with the claim language. The parties differ on what, if anything, the Court can do to fix the problem. Plaintiff suggests to rewrite the disputed claim term to make it allegedly consistent with an embodiment in the specification.

The Court agrees with the Defendant that the claim language is nonsensical because the classification unit cannot evaluate data “in the histogram” given that another limitation requires that the result of this calculation is used to create the histogram in the first place. The Court rejects Plaintiff’s argument that the phrase “to be included” is not a re-write of the claim, or that the meaning of the term is clear based on the “claim as a whole.” The Court finds that the claim language is unclear as to what is meant by “the data in the histogram.” Does the classifier unit determine the data in the histogram as expressly required in the claims? Or does the classifier unit determine the data “to be included” in the histogram? Does the admitted “problem” with the claim reside within the disputed term, or does it reside in a separate portion of the claim?

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