

This comment relates to Proposal 3 Under Pillar 1: Clarity of the Record. Specifically, this comment advocates for making claim construction during examination explicit on the record. Directing USPTO resources to this issue may require considerable agency resources initially, but in the long run those expenses will likely be recovered by making claim construction during Inter Partes Review (IPR) adjudication much more straightforward and less time-consuming. More specifically, making claim construction explicit on the record will likely result in the following benefits:

- Reduced litigation costs and IPR costs. Claim construction is frequently dispositive during adjudication. Making claim interpretation during examination explicitly on the record will reduce costs down the line by allowing the parties and judges in an adjudication to focus their analysis on the record, rather than committing resources to the time-consuming analysis of all possible interpretations having no basis in the record.
- Increased certainty. The claims of a patent are intended to give the public notice regarding the metes and bounds of the patentee's right to exclude. Requiring claim construction to be explicit on the record will better serve this underlying notice function of patent claims because the public will be given clear and explicit notice as to how the terms in a patent claim should be interpreted. Making claim construction explicit on the record will also allow would-be infringers to design around a patent, and would allow litigating parties to have more incentive to settle cases based on more predictable claim construction outcomes.
- Consistency. Making claim construction explicit on the record will provide a common starting point for district court judges and PTAB administrative judges in claim construction. This is important because district court judges and PTAB judges are using different standards for claim construction ("plain and ordinary meaning" vs. "broadest reasonable interpretation"), and this could cause widely varying results that may cause the public to lose faith in the consistency of the patent system. Providing district court judges and PTAB judges with a common starting point based on the record would greatly reduce any inconsistency in claim construction outcomes between district courts and PTAB.

However, making claim construction explicit on the record also has the following drawbacks and unintended consequences, if implemented improperly:

- Exponential growth of terms: If each claim term were given an explicit definition, then parties would likely end up arguing over both the claim terms themselves and then the meaning of the additional terms in the definition of each claim. For this reason, claim terms should be construed in a way that is flexible and capable of capturing the broad varied experiences and perspectives of a person having ordinary skill in the art (PHOSITA), such as the methodology proposed in Step 2 below.
- Overly expensive: If each claim term is explicitly defined, then either the examiner or the applicant would need to go through the laborious process of crafting exact meanings for all of the claim terms. Putting this burden on the applicant is contrary to the USPTO's policy that each claim term should be given its broadest reasonable interpretation (BRI), because the applicant may not be aware of what the BRI should be. The examiner is much more capable of crafting the BRI, since the examiner already uses PHOSITA's perspective in other areas, such as an obviousness analysis. Requiring every examiner to define the BRI of every claim term, however,

would be time-intensive and increase the backlog in patent applications. The methodology proposed below avoids these problems by streamlining the construction of the BRI for each claim term.

Directly below I propose procedural mechanisms for making claim construction explicit on the record. This proposal may allow for the aforementioned benefits to be realized while also minimizing the risks associated with the aforementioned drawbacks.

Procedural Mechanisms

- **Preliminary Phase:** First, the USPTO should construct a database of resources (encyclopedias, dictionaries and treatises) known for defining and explaining terms of art and being utilized by a PHOSITA. Second, each resource in the database should be labeled according to the official USPC and CPC classes that may use the resource. For example, the database could be called the Resource Classification System (RCS). Once the RCS is in place, examiners should have the ability to add resources to the system, with a short explanation of why the resource is relevant to the particular class. This preliminary phase will allow for implementation of the standard procedures below.
- **Standard Procedures:**
 - Step 1: Applicant should have the option to initially define the scope of any of the claim terms.
 - Step 2: If the applicant fails to exercise the option of defining claim terms, then the examiner should identify all relevant resources in the RCS database. Typically, this would simply require the examiner to define the relevant class of the application. The default definition of the **Broadest Reasonable Interpretation** (BRI) should then be *any of the interpretations found in the relevant resources.* This interpretation is both **reasonable** because it is defined from PHOSITA's perspective (i.e., the particular treatises are written for a PHOSITA) and **broad** because it relies on any of the interpretations available from PHOSITA's perspective.
 - Step 3: If the applicant intends to amend (narrow or change) the meaning of a particular claim term, then the examiner should identify that change in meaning on the record and explain how it differs from the previously defined BRI. The applicant should have unlimited opportunities to amend the meaning of claim terms.