

From: Eric Gerster
To: [PTABNPR2018](#)
Subject: in support of the PTO's proposal to alter claim construction standards
Date: Wednesday, June 27, 2018 7:30:56 PM

Director of the United States Patent and Trademark Office
Attention: Vice Chief Administrative Patent Judges
Michael Tierney & Jacqueline Wright Bonilla
PTAB Notice of Proposed Rulemaking

Dear Sir/Madam:

I am writing in support of the proposal of the United States Patent and Trademark Office (Office) to alter its claim construction standard used for interpreting inter partes review (IPR), post-grant review (PGR), and the transitional program for covered business method patents (CBM) proceedings before the Patent Trial and Appeal Board (PTAB).

At a minimum, PTAB should:

- Apply the Phillips standard of claim construction used in Article III courts. Applying BRI ("broadest reasonable interpretation"), as is now the case, to an issued patent is incorrect and harmful because that is same standard used during examination. Inspection prior to issuance necessarily must be stricter than inspection after issuance. This is a basic premise of quality control (6 sigma, TQM, lean, etc.). If the original examination is not done to a tighter standard than what is desired for the final product, then the final product is doomed to a high failure rate. More importantly, a patent claim can only be permitted to have a single scope, regardless of the adjudication venue. The patent owner, the public, and any accused infringer must all have notice and be able to rely on fixed metes and bounds in order for the patent to serve any useful purpose.
- Defer to prior constructions, absent clear error. Often an accused infringer will seek a broad construction for purposes of invalidating a patent and a narrow construction for purposes of arguing non-infringement. This is not fair. If a court or the PTAB has previously adopted a construction of the same term in the context of the same or essentially the same specification, this construction must be adopted by the PTAB.

Sincerely,

Eric Gerster