

**Response of
Red Hat, Inc. (“Red Hat”)**

**to the Notice of Proposed Rulemaking (“NPRM”) regarding
*Changes to the Claim Construction Standard for Interpreting Claims in Trial
Proceedings Before the Patent Trial and Appeal Board (“PTAB”)***

[Docket No. PTO-P-2018-0036]

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Red Hat appreciates the opportunity to comment on the above-referenced matter. As a patent owner and engine of innovation, Red Hat has a significant interest in *the inter partes* review (“IPR”) procedure¹ before the PTAB. The broadest reasonable interpretation (“BRI”) standard for construing unexpired patent claims and proposed claims in PTAB trial proceeding has been and remains the appropriate and most effective means of implementing the America Invents Act (“AIA”) and promoting confidence in the quality of patents.

Red Hat is a leading provider of open source software solutions, using a community-powered approach to deliver resilient and high-performing cloud, Linux, middleware, storage and virtualization technologies. An S&P 500 index member, Red Hat provides high-quality, trusted and affordable technology solutions that are found throughout mission-critical systems in the financial, transportation, telecommunication and government (civilian and defense) sectors in the United States and around the world. Red Hat is a patent holder of over 2300 active U.S. patents, and is a leader in such organizations as the Open Invention Network (“OIN”)² and LOT Network (“LOT”)³ that work to protect innovators from abusive patent litigation threats. Red Hat is recognized as one of the world's most innovative companies.⁴

¹ While our comments are focused primarily on *inter partes* review, they are similarly relevant to other proceedings before the PTAB: post-grant review (“PGR”) and the transitional program for covered business method patents (“CBM”).

² <https://www.openinventionnetwork.com/>.

³ <https://lotnet.com/>.

⁴ See Forbes, “The World’s Most Innovative Companies”, 2017, found at: <https://www.forbes.com/companies/red-hat/>.

***Inter Partes* review promotes innovation and the effectiveness of the patent system**

Red Hat and other innovative companies all benefit from the availability of IPR — either directly as successful or potential petitioners in IPR proceedings or indirectly through a reduction in patent-infringement litigation and the cancellation of unpatentable claims imposing roadblocks to their innovative enterprises. IPR provides a more cost-effective, efficient, and fair mechanism for resolving patentability questions. It thereby fosters innovation, promotes economic growth, and preserves the finite resources of the federal courts.

- ***Inter Partes* review removes artificial barriers to quality patents**

Congress created *inter partes* review in the AIA⁵ “to ensure that the poor-quality patents can be weeded out through administrative review.”⁶ Congress sought to “provid[e] quick and cost effective” administrative procedures for challenging the validity of patent claims, to “improve patent quality,” and to “restore confidence in the presumption of validity.” Congress charged the PTAB with eliminating “low quality and dubious” patent claims and “separat[ing] the inventive wheat from the chaff.”⁷ *Inter partes* review provides an efficient, low cost, and even handed means of eliminating unpatentable claims that would otherwise constitute a barrier to innovation.

Where the USPTO issues patents for claims that were not novel or that were obvious, those low quality and dubious patents stand as obstacles to technological progress. In the absence of the IPR procedure, innovators who are threatened with an infringement suit by the owner of an improperly issued patent generally are required either to pay for a license from the patent owner or to absorb the costs and delay of litigating the claims’ validity in court.

These impediments to technological progress were exacerbated in the years preceding enactment of the AIA by the proliferation of non-practicing entities that hoard patents – which are often, if not largely, of poor quality – with no intention of actually using them or ability to develop new inventions. As the USPTO is certainly well aware, patent assertion entity “activity cost defendants and licensees \$29 billion in 2011, a 400 percent increase over \$7 billion in 2005,” and “the losses are mostly deadweight, with less than 25 percent flowing to innovation and at least that much going towards legal fees.”⁸ *Inter partes* review allows innovative companies to clear the patent underbrush in an appropriate and more efficient manner and, in turn, to devote a greater proportion of their resources

⁵ Pub. L. No. 112-29, 125 Stat. 284 (2011).

⁶ 157 Cong. Rec. S5409 (Sept. 8, 2011) (Sen. Schumer).

⁷ H.R. Rep. No. 112-98, pt. 1, at 48.

⁸ Brian T. Yeh, Cong. Research Serv., R42668, An Overview of the “Patent Trolls” Debate 2 (2013); see also Lauren Cohen et al., The Growing Problem of Patent Trolling, 352 Science 521, 521 (2016) (finding that after settling with non-practicing entities, firms on average reduce their research and development investment by 25%).

to research and development, or licensing valuable patents addressed to useful technologies, rather than litigation regarding overly broad, invalid patents.

- ***Inter Partes* review reduces wasteful litigation spending**

The IPR process has to date fulfilled its promise (consistent with the AIA vision of providing a more timely, cost-effective, and fair mechanism to resolve patentability questions). *Inter partes* review narrows (or, as appropriate, eliminates) disputes about the patentability of claims and reduces associated costs, thus providing greater certainty in the market and removes barriers to innovation.

For example, as a direct result of IPR, owners of poor quality patents are less likely to threaten litigation or file an infringement suit based on patent claims that they know or suspect to be unpatentable. Indeed, since passage of the AIA, there has been a notable change in the nature of their patent-litigation dockets. Patent owners who seek to game the system and threaten or file suit in order to seek cost-of-litigation settlements have become less prevalent because the availability of IPR has reduced the cost, and increased the speed, of obtaining a determination of unpatentability.

This burden on the economy and innovation is meaningful. A full-blown patent-infringement case in district court can cost anywhere between \$2 million and \$10 million or more, while a typical *inter partes* review proceeding, from petition through final written decision, typically costs less than \$500,000.⁹ Those substantial litigation costs are mitigated when the PTAB cancels the asserted claims or where the initiation of inter partes review prompts a settlement between the parties.¹⁰

IPR also serves to narrow the infringement issues to be resolved by the district court where the patent owner, in defending the patentability of its claims before the PTAB, makes arguments that have the effect of disavowing claim scope. The patent holder is barred from retracting that disavowal during litigation regarding those claims. This is yet-another example of the many ways in which the patent owner's arguments and the PTAB's conclusions clarify and streamline the issues to be decided in litigation, enhancing economic efficiency.¹¹

⁹ See Am. Intell. Prop. L. Ass'n, 2015 Report of the Economic Survey 37-38 (2015), at <http://files.ctctcdn.com/e79ee274201/b6ced6c3-d1ee-4ee7-9873-352dbe08d8fd.pdf> ; RPX Corp., NPE Litigation: Costs by Key Events 3 (2015) (costs upwards of \$10 million for the 90th percentile of patent litigation), at <http://www.rpxcorp.com/wp-content/uploads/sites/2/2015/05/Final-NPE-Litigation-Costs-by-Key-Events1.pdf>.

¹⁰ See *Arctic Cat Inc. v. Polaris Indus. Inc.*, No. 13-3579, 2015 WL 6757533, at *3 (D. Minn. Nov. 5, 2015) (granting a stay pending the resolution of inter partes review because, "as the parties jointly argue, [inter partes review] may encourage a settlement without the further use of the Court") (internal quotation marks omitted).

¹¹ See *Arctic Cat Inc.*, 2015 WL 6757533, at *3 ("the PTAB's written determinations may clarify the scope of the patents and prior art, thus narrowing the disputes and limiting the breadth of discovery").

- **Inter Partes review has worked effectively and promoted confidence in the patent system**

IPR has proved to be tremendously successful to date in securing the objectives envisioned by the AIA. As the Supreme Court recently noted, IPR has “help[ed] protect the public’s paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.”¹²

By almost any measure, the IPR process has, as intended by passage of the AIA, “provid[ed] a more efficient system for challenging patents that should not have issued; and reduc[ed] unwarranted litigation costs and inconsistent damage awards.”¹³

Estimates of those costs, even in most basic terms, range upwards into billions of dollars simply by avoiding “deadweight losses by providing an efficient system for challenging patents.”¹⁴

The intangible benefits are also reflected in heightened confidence in the patent system, where IPR minimizes the risk of having invalid or poor quality patents disrupt the innovation system and discourages abusers of patent litigation from gaming the system.

Broadest Reasonable Interpretation is the appropriate and effective standard for PTAB proceedings

The USPTO proposes replacing in PTAB proceedings the current BRI claim construction standard for interpreting unexpired patent claims (and claims proposed in a motion to amend), with an approach for determining patent validity that is used by federal courts (the so-called “Phillips” standard, following *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir.2005) (*en banc*)).

As laid out in the previous section, IPR has proved to be tremendously successful to date in securing the statutory language and legislative objectives of the AIA. It effectively reduces the strain placed on the courts to confront the often complex issues of patentability and validity, which are best addressed by knowledgeable experts sitting on the PTAB. It also clears the way for innovative companies to focus on technological advancement rather than wasting valuable resources on defending meritless

¹² *In re Cuozzo Speed Techs.*, 136 S. Ct. at 2144 (ellipsis in original; internal quotation marks omitted).

¹³ See footnote 12, above.

¹⁴ Josh Landau, “Inter Partes Review: Five Years, Over \$2 Billion Saved”, Sept. 14, 2017 (found at: <https://www.patentprogress.org/2017/09/14/inter-partes-review-saves-over-2-billion/>). “This benefit is purely based on avoiding deadweight loss from legal fees; it does not account for the benefit of preventing transfers from defendants to plaintiffs based on patents that should have been invalidated. The financial data used in this analysis is based on publicly available data, as well as some data derived from the [2017 AIPLA Economic Survey](#).”

patent assertions that represent an unproductive drain on the economy. BRI has been a key element of IPR's success to date.

- **PTAB proceedings have distinct purposes relative to federal district court litigation**

In the framework of the AIA, Congress established the IPR process intentionally through the venue of the PTAB, and distinct from the district court. As the Supreme Court stated in *Cuozzo*, there are characteristics “which make these [PTAB] agency proceedings similar to court proceedings, . . . in other significant respects, *inter partes* review is less like a judicial proceeding and more like a specialized agency proceeding.”¹⁵ The Court determined that, because of the differences between litigation in district court and IPR proceedings before the PTAB, “the purpose of . . . [IPR] is not quite the same as the purpose of district court litigation” as it serves to “reexamine an earlier agency decision.”¹⁶

- **The *Phillips* standard applied in PTAB proceedings could promote confusion and uncertainty**

As we read the NPRM, the stated goal of replacing BRI with the *Phillips* standard is to seek consistency with the claim construction standard in PTAB proceedings and as used in federal district courts and other fora. Thus, USPTO envisions this change as the means toward “minimizing differences between claim construction standards used in the various fora [that] could lead to greater uniformity and predictability of the patent grant.”¹⁷ The NPRM also claims use of the *Phillips* standard in PTAB proceedings will “increase judicial efficiency overall” since many patent at issue in IPR proceedings have also been the subject of litigation in the federal courts.¹⁸

But this is a proposed solution in search of a problem: Based on actual outcomes, and despite the fact that courts have recognized that potentially different outcomes were envisioned in the AIA statutory framework,¹⁹ there has been a notable similarity in overall findings of invalidity between the PTAB and district courts. “Whether you challenge a patent at the PTAB [or] in district court . . . around 40-45% of all challenged patents are determined to be invalid in whole or in part. The PTAB is making the same kinds of decisions, in about the same numbers, as every other body charged with reviewing patent validity.”²⁰

¹⁵ *Cuozzo*, 136 S. Ct. at 2144.

¹⁶ *Id.* at 2144.

¹⁷ 82 Fed Reg 21222.

¹⁸ *Id.* at 21223.

¹⁹ “... “we cannot find unreasonable the [USPTO’s] decision to prefer a degree of inconsistency in the standards used between the courts and the agency, rather than among agency proceedings.” *Cuozzo* at 2146.

²⁰ Josh Landau, “A Little More Than Forty Percent: Outcomes At The PTAB, District Court, and the EPO”, May 1, 2018, found at: <https://www.patentprogress.org/2018/05/01/a-little-more-than-forty-percent/>.

What is key is that the PTAB makes it *significantly cheaper and more efficient* to get to that point, consistent with sound principles of patent prosecution, allowing small and medium businesses to defend themselves from poor quality and abusive litigation, instead of being forced to pay because they couldn't afford to defend themselves, or because it was cheaper to pay than to fight.

In this context, the USPTO risks promoting confusion in transitioning from BRI to the *Phillips* standard. The courts have noted that there have been in some instances significant differences between BRI and *Phillips* constructions.²¹

Moreover, the history of district courts utilizing a 'unified' approach applying *Phillips* has not consistently been born out.²² The experience is similar among various circuits.²³ Because the *Phillips* standard is susceptible to various reasonable interpretations, which can produce multiple possible constructions, there is no certainty that decisions of the PTAB and the courts will be 'harmonized'.

The potential for confusion is particularly ripe given the recent *SAS*²⁴ and *Aqua Products*²⁵ decisions, which have required significant alternations in PTAB proceedings. We note that NPRM is silent on evaluating a shift from the BRI standard to that of *Phillips*.

- If the USPTO adopts the *Phillips* standard for PTAB proceedings, it is essential that PTAB:

²¹ *PPC Broadband, Inc. v. Corning Optical Commc'ns RF, LLC*, 815 F.3d 734 (Fed. Cir. 2016) at 741.

²² See, e.g., *American Piledriving Equipment v. Geoquip, Inc.*, 637 F.3d 1324, 1327 (Fed. Cir. 2011).

²³ See, e.g., *CVI/Beta Ventures, Inc. v. Tura Lp*, 112 F.3d 1146, n.7 (Fed. Cir. 1997).

²⁴ *SAS v. Iancu*, 138 S. Ct. 1348 (2018). The impacts of the change on petitioner and patent owner in PTAB proceedings (See Guidance on Motions to Amend in view of *Aqua Products* (Nov. 21, 2017), available at https://www.uspto.gov/sites/default/files/documents/guidance_on_motions_to_amend_11_2017.pdf following *SAS* are not yet determined. More importantly, the impact of this change on the courts is also undetermined. For example, courts may become more willing to stay litigation given the knowledge that the PTAB will render judgment on all of the challenged claims of the patent and will create a broader estoppel against invalidity challenges. This increase in likelihood of stay will then itself result in fewer opportunities for inconsistency.

²⁵ *Aqua Products v. Matal*, 872 F.3d 1290 (Fed. Cir. 2017). BRI has been tied to the ability to amend claims in proceedings. Until the impact of the *Aqua Products* decision on amendments is fully understood, changes to the claim construction standard (and potentially amendment procedures) are likely to create unintended risks.

- retain the standard of using a preponderance of the evidence in making its determinations. In *Cuozzo*, the Court stated that “*inter partes* review imposes a different burden of proof on the challenger” than district court litigation, and that “[t]hese different evidentiary burdens mean that the possibility of inconsistent results is inherent to Congress’ regulatory design;”²⁶
- reject retroactive application of the *Phillips* standard;
- amend the AIA trial schedule to ensure the simultaneous exchange of claim constructions; and
- bar application of the *Phillips* standard in AIA trials where the patent owner has proposed amendments to the claims;

Once, again, we appreciate this opportunity to provide our comments on this NPRM. Please do not hesitate to contact us if we can provide further information or answer questions.

Contact:

Mark Bohannon
Vice President, Global Public Policy
and Government Affairs
Red Hat
markb@redhat.com

David Perry
Senior Patent Counsel
Red Hat
dperry@redhat.com

²⁶ *Cuozzo*, 136 S. Ct. at 2146.