



July 9, 2018

The Honorable Andrei Iancu
Under Secretary of Commerce for Intellectual Property
Director of the United States Patent and Trademark Office
U.S. Patent and Trademark Office
60 Dulany Street
Alexandria, VA 22314

TPA Comments on USPTO's Proposed Changes to the Claim Construction Standard Used in PTAB Proceedings (Docket number: PTO-P-2018-0036)

Under Secretary Iancu:

The Taxpayers Protection Alliance, representing millions of entrepreneurs across the country, applauds you for proposing recommendations to strengthen due process protections for patent holders under Patent Trial and Appeal Board (PTAB) proceedings. These proceedings, which began following the passage of the 2011 America Invents Act, follow the “broadest reasonable interpretation” for claims on unexpired patents. The current claim construction standard, which is broader than federal District Court usage, has led to higher patent invalidation rates at PTAB hearings relative to ordinary court proceedings.

Federal courts, as well as the International Trade Commission, use the *Phillips* standard of treating claims text by its “ordinary and customary meaning” as interpreted by “a person of ordinary skill in the art ... at the time of the invention.” The Federal Circuit previously found that the *Phillips* standard can lead to claim interpretations that are either the same or narrower than the “broadest reasonable interpretation,” but it cannot be broader.

Thus, patent protection can only increase if PTAB abandons the “broadest reasonable interpretation” in favor of the *Phillips* standard. The current disconnect between District Court, ITC, and PTAB standards create legal inconsistencies that afford special advantages to alleged infringers. Patent opponents can use the narrow *Phillips* standard in District Court to limit the claims of patent holders, while arguing for a broad standard before the PTAB to invalidate the patent. This shopping around creates inefficiencies throughout the legal system, while making innovation less safe from predation.

Supporters of the status-quo of broader standards claim that patent, copyright, and trademark protections diminish competition by allowing legally-savvy companies to shield themselves from legitimate competitors. According to this reasoning, PTAB should have loose-enough standards to allow for the invalidation of “useless” patents. In truth, uncertainty in IP protection harms American innovation and acts as an implicit tax on American businesses. Research from Washington University, Iowa State University, and the



Swedish House of Finance demonstrate that, of various government measures to foster innovation, only patent protection and basic financial market rules are effective.

Therefore, the Taxpayers Protection Alliance concurs with the Notice of Proposed Rulemaking that a *Phillips* claims construction standard across-the-board would bolster intellectual property protection across America. Judging claims text by its “ordinary and customary” meaning will ensure that patent owners have the right incentives for innovation and entrepreneurship.

Sincerely,

A handwritten signature in black ink, appearing to read "David Williams".

David Williams
President