

**From:** Todd Bankhead  
**To:** [PTABNPR2018](#)  
**Subject:** The USPTO Proposed Changes Support  
**Date:** Thursday, June 28, 2018 12:16:09 PM

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*The United States Patent and Trademark Office (“USPTO” or “Office”) proposes changes to the claim construction standard for interpreting claims in 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” or “Board”). In particular, the Office proposes to replace the broadest reasonable interpretation (“BRI”) standard for construing unexpired patent claims and proposed claims in these trial proceedings with a standard that is the same as the standard applied in federal district courts and International Trade Commission (“ITC”) proceedings. The Office also proposes to amend the rules to add that the Office will consider any prior claim construction determination concerning a term of the involved claim in a civil action, or an ITC proceeding, that is timely made of record in an IPR, PGR, or CBM proceeding.*

Director Iancu:

I strongly support, and urge adoption of, the proposed rule that is the subject of your May 3, 2018 notice regarding PTAB's use of the Phillips claims construction standard and of prior claim constructions.

The proposed rule change should be adopted as soon as possible for a multitude of reasons, including beginning the restoration of our patent system to global preeminence, encouraging innovation, and fulfillment of the spirit and original purpose underlying the AIA.

Of critical importance, the new rule should be implemented so as to apply to any USPTO post grant proceeding that is at any stage, including those that are the subject of a final order and that are now, or sufficiently recent that they could be, in the appellate process. More specifically, USPTO should, *sua sponte*, vacate all PTAB orders that have been issued for all post grant proceedings in which any claims construction standard other than Phillips was used, in which the result was adverse to the patent-holder, and where the order has been appealed (and remains in any stage thereof) or remains subject to appeal. This implementation step, also, is necessary in order to achieve the goals of the AIA, basic fairness, conservation of litigation expense, and for purposes of judicial economy.

Finally, I urge also that the rule change be expanded to be made applicable to all post grant reviews/reexaminations/IPRs (regardless of their statutory basis), so that whenever a claims construction is at issue in any USPTO post grant proceeding, under any statute, only one standard, Phillips, is used, and with due consideration being given to prior claims constructions.

Thank you.

Todd Bankhead