



July 9, 2018

By Email: PTABNPR2018@uspto.gov

United States Patent and Trademark Office
Attn: Michael Tierney,
Vice Chief Administrative Patent Judge
600 Dulany Street
Alexandria, VA 22313

Docket No. PTO-P-2018-0036

Subject: Comments from Trading Technologies International, Inc. Regarding Proposed Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board

Trading Technologies International, Inc. (“TT”) is grateful to the United States Patent and Trademark Office (“USPTO”) for the opportunity to provide comments regarding the proposed rule changes to Title 37 of the Code of Federal Regulations for the claim construction standard used in *inter partes* review, post-grant review, and the transitional program for covered business method patents proceedings (collectively, “AIA Post Grant Proceedings”) before the Patent Trial and Appeal Board (“PTAB”).

TT appreciates the USPTO’s efforts in developing the proposed rule to replace the current claim construction standard for the AIA Post Grant Proceedings with the claim construction standard set forth in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc) (“Phillips Standard”), which also is the same claim construction standard applied in federal court and International Trade Commission (“ITC”) proceedings. Under the Phillips Standard, the PTAB is generally instructed to give claim terms their “ordinary and customary meaning” as “the meaning

that the term would have to a person of ordinary skill in the art in question at the time of the invention,” *Phillips*, 415 F.3d at 1315.

TT strongly supports changing the claim construction standard used in AIA Post Grant Proceedings to the Phillips Standard.

i. The Change Will Promote a Consistent Understanding of the Invention’s Scope

TT believes that having the same standard at the PTAB and federal court proceedings increases uniformity and predictability of patent validity disputes. Using the Phillips Standard drives toward a common, unified understanding of the invention’s scope. This allows companies to assess risk and understand the metes and bounds of the invention. With different standards being applied to a patent, Patent Owners, like TT, run the risk of receiving different constructions for the same terms. Switching to the Phillips Standard will eliminate this risk, thereby promoting confidence in the patent system for both Patent Owners and those utilizing the inventions set forth in those patents. Indeed, applying the Philips Standard provides a balanced implementation of AIA Post Grant Proceedings.

ii. The PTAB Should Presume the Patent Is Valid when Construing the Claims

When utilizing the Phillips Standard, the USPTO should make clear that the claims should be construed to uphold their validity. Courts must presume that a patent is valid and apply a construction based on the claim language, the patent specification, the prosecution history, and any other supporting evidence. The same should be done at the PTAB. The presumption of validity should be provided to the patent. This will further increase efficiencies in the U.S. Patent ecosystem and provide further clarity.

iii. The PTAB Should Give Deference to Prior Constructions

The PTAB should also be instructed to consider how the claim terms may have been previously construed such as during other proceedings before the USPTO, including other PTAB proceedings involving the same or related patents, as well as claim construction rulings issued by federal courts and the ITC, which also apply the Philips Standard. Indeed, to the extent that the other fora developed claim constructions based on consideration of an evidentiary record, such as

testimony, affidavits, and declaration from experts, the PTAB should give deference to those decisions.

In sum, TT welcomes the implementation of the proposed rule change and looks forward to working with the USPTO to develop future improvements to AIA Post Grant Proceedings.

Respectfully submitted,

/s/ Jay Q. Knobloch

Jay Q. Knobloch
Joseph W. Flerlage
Trading Technologies International, Inc.