

“Addressing Video Game Claims Under the Phillips Standard at the PTAB”

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Last fall, the PTAB [modified its procedures](#) for IPR claim construction, eliminating the use of the broadest reasonable interpretation standard. Since the [rule change](#) last year, companies challenging the validity of patents at the PTAB are required to use the *Phillips* plain and ordinary meaning standard.

Many petitioners are now grappling with the strategic consequences of the rule change, particularly with how to handle claims that contain language that a district court may find indefinite under 35 U.S.C. 112 and therefore invalid. Because the PTAB is not permitted to find a claim indefinite, a petitioner has to decide how to sufficiently address potentially indefinite claim language in a petition without implicitly conceding that the claim language is amendable to a reasonably certain claim construction. Indefiniteness issues are particularly endemic in patents asserted against gaming companies, as many such patents relate to relatively abstract concepts and functionally claim software designs that present intertwining subject-matter eligibility (35 U.S.C. 101) and indefiniteness (Section 112) issues.

The PTAB issued an [order](#) denying institution of an IPR filed by Niantic that presents this problem. In its petition, Niantic took the approach of only addressing the Patent Owner’s construction of a term, while noting that it believed the term was indefinite. The challenged patent generally related to virtual gaming environments and the specific term at issue in the PTAB’s order was a “virtual thematic environment.” The Patent Owner had proposed construing “virtual thematic environment” as “a theme-based virtual computer interface which may take the form of a game.” In denying institution, the PTAB found that Niantic had not adequately addressed the Patent Owner’s construction of the term, and had simply stated that the prior art “discloses a client-server system for integrating real-time information into a virtual environment.” The PTAB noted that the petition did “not even allege that [the prior art] teaches a virtual computer interface that is theme-based, much less provide a persuasive explanation or evidence.” Notably, the PTAB panel made no attempt to examine or analyze the prior art on its own to assess whether it taught a theme-based virtual computer interface.

This decision serves as a warning that even if a petitioner attempts to sidestep indefiniteness issues at the PTAB by only focusing on the patent owner’s proposed claim construction, the petitioner must still adequately address the patent owner’s constructions and provide specific explanations of how the art invalidates the claims under those proposed construction.

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