

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HUAWEI DEVICE USA, INC., HUAWEI DEVICE CO. LTD., HUAWEI
TECHNOLOGIES CO. LTD., HUAWEI DEVICE (DONGGUAN) CO. LTD.,
HUAWEI INVESTMENT & HOLDING CO. LTD., HUAWEI TECH.
INVESTMENT CO. LTD., HUAWEI DEVICE (HONG KONG) CO. LTD.

Petitioners

v.

CYWEE GROUP LTD.
(record) Patent Owner

Case IPR2019-00563
Patent No. 8,552,978

**REPLY TO OPPOSITION TO PETITIONERS' MOTION FOR JOINDER
TO IPR2018-00563**

I. Introduction

Huawei's petition is nearly identical to the Google IPR petition, and joinder will not require any new discovery or disrupt the schedule. Patent Owner nonetheless raises irrelevant and inaccurate concerns about the already-stayed district court proceedings to try to make this IPR look more like *Unified Patents* (e.g., Patent Owner ignores that all the Huawei Petitioners *already* are real parties in interest in the Google IPR). In reality, there is no prejudice to Patent Owner, and the Board's prior decisions compel joinder of the two proceedings.

II. *Unified Patents* Is Not Controlling or On Point

Patent Owner's opposition relies primarily on the joinder decision in *Unified Patents* (IPR2014-00702, Paper 12). The Board has recognized that *Unified Patents* is "not precedential" and, in cases like here, has limited applicability. E.g., *Samsung v. Raytheon* (IPR2016-00962, Paper 12 at 7). As recognized in *Samsung*, the *Unified Patents* decision was premised on a unique set of factors:

(1) the second-filed petition added additional substantive issues to the earlier proceeding—namely, the question of whether all real-parties-in-interest had been identified; (2) Petitioner did not address how joinder would impact the schedule of several related *inter partes* review proceedings; and (3) nearly all of the challenged claims had previously been determined to be unpatentable in an earlier final written decision.

Id.

In contrast, like the Petition in *Samsung*, Huawei’s Petition “adds no additional substantive issues to the earlier proceeding, [Huawei] has agreed to take on only an understudy role in the [Google] IPR, thus, no change to the schedule is necessary, and no final written decision has been issued by the Board regarding the [’978] patent.” *See id.* Thus here, like in *Samsung*, *Unified Patents* is inapposite.

III. The Claim Construction Rule Change Is Not A Basis to Deny Joinder

The Board instituted *inter partes* review for the Google Petitions under the broadest reasonable interpretation (BRI) standard. Subsequently, the rule has changed from BRI to *Phillips* for petitions filed after November 13, 2018.

(*Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the PTAB*, 83 Fed. Reg. 51340 (Oct. 11, 2018) (“Rules Change,” Kleinman Decl. Ex. 1).) Patent Owner argues that this rule change “presents a new issue based solely on the timing of the petition” sufficient to preclude joinder. (*See Opp.* at 7-8). Patent Owner is incorrect.

First, the Board should apply the BRI standard to Huawei just as it will to Google. Huawei seeks to join the existing Google proceeding as a party. *See* 35 U.S.C. § 315(c) (stating that the Director “may join as a party to *that* inter partes review” later petitioners) (emphasis added). Granting Huawei’s request would result in dismissal of Huawei’s petition pursuant to 37 C.F.R. § 42.71(a). *See, e.g., Samsung v. Uniloc*, IPR2018-01383, Paper 9 at 6. Following such order, the

timing of Huawei’s now-dismissed petition becomes moot, and the Google IPR will proceed as instituted under BRI, with Huawei joined.¹

Further, Patent Owner fails to identify any construction from the Institution Decision that would change under *Phillips*. Thus, far from a purported “new issue” that the Board “will need to address,” there is no term where the rule change will have any impact on the Board’s analysis in the Institution Decision. As recognized by the Office in conjunction with the rule change, rare is the case where the end result would be materially different under *Phillips* versus BRI:

As the Federal Circuit recently explained, “[i]n many cases, the claim construction will be the same under [both the BRI and *Phillips*] standards.” *In re CSB-System Int’l, Inc.*, 832 F.3d 1335, 1341 (Fed. Cir. 2016). “Even under the broadest reasonable construction rubric . . . , the board must always consider the claims in light of the specification and teachings in the underlying patent.” *In re Power Integrations, Inc.*, 884 F.3d 1370, 1375 (Fed. Cir. 2018) (citation and

¹ Further, because this is a change to a rule (37 CFR § 42.100) and not a change to the underlying statute, the Board can eliminate any disparity caused by the unique timing of this case by exercising its discretion under 37 C.F.R. § 42.5(b) and waiving application of the *Phillips* standard to Huawei’s Petition. See § 42.5(b) (“The Board may waive or suspend a requirement of parts 1, 41, and 42.”).

internal quotation marks omitted). “And there is no reason why this construction could not coincide with that of a court in litigation.” *Id.* ... The IPO study indicates that, since 1986, “there have been very few decisions in which courts have attributed a variance in claim interpretation to the differences between the two standards.” *Id.* at 1. In sum, consistent with the IPO study and the Federal Circuit, we believe that the patentability determination reached will be consistent for BRI and Phillips in the vast majority of cases decided.

Rules Change at pp. 12-13 (“Response to Comment 4”). *See also Microsoft Corp. v. Enfish, LLC*, 662 F. App’x 981, 984 (Fed. Cir. 2016). Given this, Patent Owner’s argument that the rule change represents a “new issue” that “the Board will need to address” is nothing more than speculation.

IV. Patent Owner’s Additional Arguments Provide No Basis for Denying Huawei’s Joinder Motion

None of Patent Owner’s remaining arguments provides a basis for denying Huawei’s motion. For instance, Patent Owner argues that “Huawei’s joinder to this case also raises new questions regarding RPIs” and “will create the need for CyWee to engage in discovery.” (Opp. at 9.) But Patent Owner fails to mention that every single one of the Huawei Petitioners already is named as a real party in interest in the Google IPR. Google IPR, Paper 1, p. 5. As such, joining the Huawei Petitioners as named parties to the existing IPR would create no more of a “need for CyWee to engage in discovery” than already exists in the Google IPR.

As another example, Patent Owner misstates the record regarding the *Zhang*

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