

ALERT

Supreme Court Hears Arguments on Whether the Broadest Reasonable Interpretation Standard Should Apply in *Inter Partes* Reviews

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On April 25, the Supreme Court of the United States heard arguments in *Cuozzo Speed Technologies v. Lee*. The *Cuozzo* case presents two questions, (1) whether the Broadest Reasonable Interpretation standard should apply in *inter partes* reviews (IPR) before the Patent Trial and Appeal Board (PTAB), and (2) whether the decision to institute an IPR is reviewable. The Court spent very little time on the second question and instead focused on whether the Broadest Reasonable Interpretation standard should apply in IPRs.

Currently, the PTAB uses the Broadest Reasonable Interpretation standard when evaluating unexpired claims in IPR, just as the PTO does when examining unexpired claims in any other context. See 37 C.F.R. 42.100(b) (“A claim in an unexpired patent shall be given its broadest reasonable construction in light of the specification of the patent in which it appears.”). By following this rule, the PTAB ensures that every reasonable construction of an ambiguous claim is consistent with the requirements of patentability. Because the patentee has the opportunity to amend its claims, following the Broadest Reasonable Interpretation standard ensures that the risk of overbroad claims is borne by the patentee, not the public.

Petitioner Cuozzo Speed Technology, the patent holder, argues that IPR is a substitute for district court litigation and as such, the same standard should apply in both proceedings, *i.e.*, plain and ordinary meaning. See *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (establishing the plain and ordinary meaning standard for district

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court litigation). Congress, in passing the statute establishing the IPR proceeding, was silent on this issue.

During argument, the Justices spent much time questioning whether the IPR proceeding is closer to an *ex parte* examination or to a district court proceeding, particularly on whether claim amendments are really a viable option in IPRs. Justice Ginsburg observed that IPR is “kind of a hybrid,” resembling both an administrative proceeding and a district court proceeding. Out of all the Justices, Chief Justice Roberts seemed the most troubled by the IPR proceeding in general and by the use of conflicting standards in particular. At points he described the situation as a “very extraordinary animal in legal culture to have two different proceedings addressing the same question that lead to different results” and a “bizarre way to conduct legal – decide a legal question.”

Ultimately, what may prove fatal to the petitioner’s case is that at best, the petitioner seemed to show that it is *plausible* that Congress intended for the *Phillips* plain and ordinary meaning standard to apply in IPR. If there are two plausible ways for interpreting a statute that is admittedly silent on this issue, the Court may defer to the Agency’s interpretation. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

On this point, there was a revealing exchange between Justice Kagan and the attorney for the petitioner, Garrard Beeney. Justice Kagan asked if petitioner’s argument was “that Congress couldn’t have thought anything else except that the ordinary –meaning standard would control? Because if I look at the statute, I mean, it just doesn’t say one way or the other. So we’re a little bit reading tea leaves, aren’t we?” Mr. Beeney confirmed that this was only a slight exaggeration of the petitioner’s position, which prompted Justice Kagan to respond that “if I’m trying to put myself in Congress’s position, I’m . . . looking at the PTO, and it does pretty much everything by this broadest-construction standard. And if I had their clear intent that you’re suggesting, given the backdrop of how the PTO generally operates, wouldn’t I say so?” Mr. Beeney’s answer to this question is telling: “I think not, Justice Kagan, for the historical reason that Congress has never addressed claim-construction issues. It’s always been a matter left to the judiciary.”

This answer essentially admits that Congress delegates claim-construction issues to the reviewing body. If that is what Congress did here, it would seem unlikely that the Court would take on the role that Congress declined for itself and tell the PTO how it should evaluate claims. Justice Breyer similarly suggested there were two plausible reasons for Congress to have created the IPR process: (1) to provide a more efficient substitute for district court litigation, or (2) to tell the PTO to “get rid of” the “billions of patents that shouldn’t have been issued.” He then explained that if the statute is “ambiguous between those two purposes . . . maybe [the PTO] should have the power themselves under *Chevron*, *Meade*, or whatever to decide which to do.”

If a majority of the Justices agree that both the petitioner’s and the government’s positions are plausible, the Supreme Court will likely defer to the agency’s reasonable interpretation. This is a case to watch closely, as it has the potential to profoundly alter the IPR procedure that has until now been a successful avenue for cancelling numerous patents. The Supreme Court’s decision is expected before the end of the term in June.