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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNIFIED PATENTS INC.
Petitioner

v.

BRADIUM TECHNOLOGIES LLC,
Patent Owner

IPR2018-00952
U.S. 9,253,239

PETITIONER'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE ON REAL PARTIES IN INTEREST

I. INTRODUCTION

Petitioner Unified Patents, Inc. ("Unified") certified that it is the sole real party-in-interest ("RPI"). Patent Owner Bradium Technologies LLC ("Bradium"), in its Patent Owner Preliminary Response ("POPR"), contests that certification, and in doing so proposes an incorrect legal standard and relies on speculative attorney argument. Their challenge should be rejected.

Bradium's proposed standard—that *any* member of a for-profit association that files IPRs that may benefit its members is an RPI—runs contrary to the multi-factor inquiry required by the Trial Practice Guide ("TPG") and confirmed by the Federal Circuit. The TPG and recent Federal Circuit precedent make clear the appropriate test governing an IPR inquiry. And the Board recently addressed this, finding that even where members were sued for patent infringement—unlike here—they were not RPIs. *See Unified Patents Inc. v. Realtime Adaptive Streaming, LLC*, IPR2018-00883, Paper 29, at 16 (Oct. 11, 2018) (institution decision) (currently under seal).

Despite Unified's voluntary provision of agreed-upon discovery, including its Membership Agreements and a deposition of Unified's CEO, Bradium points to ***no*** evidence that anyone other than Unified desired review of the challenged patent or participated in any way in this IPR. Bradium has not filed a complaint against any Unified member. No third party other than Microsoft—not a member—would be time-barred under 35 U.S.C. § 315(b). Bradium speculates this challenge *might* affect

Unified members. But there is no open litigation, no member has been sued, and there is no evidence of benefit. In contrast, the record evidence demonstrates that Unified controlled, directed, and funded this petition, did not communicate with any of its members regarding filing, and that none of Unified's members have been sued by Bradium. Unified's certification is correct.

II. LEGAL STANDARD

Determining whether an unnamed party is an RPI "is a highly fact-dependent question" with no "bright line test," assessed "case-by-case." Trial Practice Guide ("TPG"), 77 Fed. Reg. 48,756, 48,759 (Aug. 14, 2012) (citing *Taylor v. Sturgell*, 553 U.S. 880 (2008)). The most important factors are whether the third-party funded, directed, or controlled the IPR. *See* TPG, 77 Fed. Reg. at 48,760 (stating "a party that funds and directs and controls an IPR . . . petition or proceeding constitutes a [RPI]"); *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336, 1354 (Fed. Cir. 2018) ("*AIT*") (endorsing the approach in *Cisco Sys., Inc. v. Hewlett Packard Enter. Co.*, IPR2017-01933, Paper 9 (Mar. 16, 2018) (focusing on the indicia of funding, direction, and control)).

In *AIT,* the Federal Circuit endorsed the Trial Practice Guide's RPI analysis and clarified that it is fact-specific and multi-factored. *AIT*, 897 F.3d at 1351; *see also Worlds Inc. v. Bungie, Inc.*, 903 F.3d 1237, 1246 (stating *AIT* "clarify[ied] the meaning of the term 'real party in interest' in the context of § 315(b)"); *Realtime Adaptive*,

IPR2018-00883, Paper 29, 11 (citing both *AIT* and the TPG). The court endorsed the TPG's guidance that membership in an association alone does not suffice to render one an RPI. *See AIT*, 897 F.3d at 1351. The Federal Circuit remanded because the Board panel failed to consider record facts, including: multiple ongoing communications between the petitioner and the third party regarding litigation defense and settlement strategies related to the patent, suspicious payments made just before the IPR filing, the presence of a time bar for the third party, and the fact that the petitioner and the third party shared common members on their boards of directors. *See AIT*, 897 F.3d at 1340-42. None of those factors are present here.

Bradium does not follow *AIT*, instead proposing a new standard that would make any member of a for-profit association an RPI if that association files a challenge that might benefit a member. *See* POPR, 5-7. This ignores most of the *AIT* factors in favor of a new legal test evaluating only whether there is a pre-existing relationship with a party that could be benefited by the IPR.

Another Board panel rejected a similar misreading of *AIT*. In *Realtime Adaptive*, IPR2018-00883, Paper 29, 14, the Board held that "the RPI analysis set out in *AIT* and the common law require more than simply confining the analysis to determining whether a party benefits generally from the filing of this Petition and relationship with the Petitioner." In finding that Unified's members were not RPIs, the Board in *Realtime Adaptive* found significant that, unlike in *AIT*, there were no

communications with members who were also ongoing litigants, and none were time-barred.

Bradium's new test would end where the RPI inquiry begins. *See AIT*, at 1351; *see also Realtime Adaptive*, IPR2018-00883, Paper 29, 15-16 (warning against "cut[ing] short the RPI analysis set out in *AIT*"). Under Bradium's proposal, anyone sued for patent infringement would become a presumptive RPI in IPR challenges to the asserted patent filed by anyone with which it has a relationship where it *could* benefit from the challenge. Bradium's approach would mean all buyers, sellers, subcontractors, subsidiaries, parent corporations, contractual partners, and others with preexisting relationships, such as members of a joint defense groups would be RPIs to a challenge by any one of them. The TPG and *AIT* rejected such a broad approach. *See AIT*, 897 F.3d at 1351 (citing TPG, 77 Fed. Reg. at 48,760 (trade association or joint defense group membership does not alone render an entity an RPI)). Bradium's approach would hinge on *the patent owner's* decision to sue, and would allow patent owner's to "create" RPIs. The RPI analysis is deeper than whether a relationship exists; it must also consider whether the petitioner filed "at the behest" of an unnamed party. *AIT*, 897 F.3d at 1351 (citing the TPG, 77 Fed. Reg. at 48,759).

III. UNIFIED IS THE SOLE REAL PARTY IN INTEREST

In the almost 120 challenges before the Patent Office, both before and after *AIT*, each time a patent owner has challenged Unified's RPI certification, the Board has

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