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Unified Patents Adds AIA Reviews To Anti-'Troll' Arsenal

By **Erin Coe**

Law360, San Diego (June 23, 2015, 2:07 PM EDT) -- Technology industry consortium Unified Patents Inc. has lodged nearly two dozen America Invents Act proceedings to challenge patents it believes should never have been issued in the first place, an approach that attorneys say builds on tactics by defensive patent aggregators in their shared effort to combat so-called patent trolls.

Unified Patents, whose more than 90 members include Google Inc. and NetApp Inc., was formed in the summer of 2012, right before the America Invents Act took hold. That law allowed for more concerted invalidity attacks on patents in inter partes review proceedings before the U.S. Patent and Trademark Office, and Unified Patents hasn't wasted any time making use of the reviews.

In a push to remove weak patents from the marketplace altogether, Unified Patents has filed a total of 21 inter partes review petitions since 2012 — more than any other third party. It was the first independent entity to initiate an inter partes review that led to the invalidation of a patent — owned by Clouding IP LLC covering cloud technology — in March, according to the group's chief operating officer, Shawn Ambwani.

The group targets patents in five "zones": cloud storage, content delivery, electronic payments, wireless and automotive.

"We are like a bulldog," Ambwani said. "If you come into our zone with crappy patents, we're going to bite you."

For years, nonpracticing entities have been a thorn in tech companies' side. They acquire often broadly written patents and assert them against companies in the hopes of extracting a quick settlement that is less expensive for defendants than fighting the case in court.

In response, some technology companies have sought protection by joining groups like RPX Corp. and Allied Security Trust that use membership fees to acquire patents that are viewed as a risk of being asserted in abusive suits.

A unique and important part of Unified Patents' overall strategy is filing inter partes review petitions to undermine current assertions based on invalid patents by large nonpracticing entities against companies in the technology industry as well as the auto industry and to deter future claims in the same space, according to Ambwani. While RPX has filed a total of 14 inter partes review petitions, its focus remains on defensive patent acquisition.

Inter partes reviews are proving to be a major weapon against nonpracticing entities because, if the USPTO holds a patent is invalid, that finding does not just benefit defendants in immediate litigation, but it also benefits those in the field that could be subject to suits, according to Mark Wine, co-head of Orrick Herrington & Sutcliffe LLP's patent practice.

"Getting a license on a patent or buying a patent doesn't give the entire marketplace freedom to operate, but an inter partes review strategy can wipe that patent out," he said.

Unified Patent's use of inter partes reviews adds to other groups' attempts to thwart nonpracticing

entities, including patent purchasing and licensing strategies and lobbying for patent law reform in Congress, according to Eugene Mar, a partner at Farella Braun & Martel LLP.

"Unified Patents and other defensive patent consortiums are part of the rubric to get at the patent troll problem," he said. "I wouldn't attribute credit to any one group for being the solution to the problem, but Unified Patents is part of the mix and addresses some of the patents creating headaches for folks."

RPX, a publicly traded company that has more than 220 members, concentrates on acquiring patents before they get into the hands of a nonpracticing entity, and members can obtain licenses to every patent it owns. It also will purchase patents from nonpracticing entities that are asserted against RPX members that seek to settle litigation. According to the group, it has spent more than \$2 billion to acquire more than 10,000 patent assets and rights, avoiding more than 3,000 suits and leading to more than 800 dismissals from suits on behalf of its members.

Allied Security Trust also buys patents, including some from nonpracticing entities, with the hope of protecting members from litigation. It does not license the patents it purchases to all of its members, but only to those that helped fund the acquisition. Its 28 members include Google, Microsoft Corp. and IBM Corp.

While purchasing patents from nonpracticing entities might reduce the immediate cost of litigation, it does not deter future litigation, according to Ambwani, whose group has a patent-purchasing component but has never bought a patent from a nonpracticing entity.

"We do not believe it is possible to buy your way out of the nonpracticing entity problem," he said. "It merely exacerbates it by decreasing transaction costs and incentivizing nonpracticing entities to go after the same groups over and over again since they can get a good return."

Linda Biel, senior vice president of business development at Allied Security Trust, disagreed that its strategy fueled litigation, saying she sees the approaches used by both Unified Patents and Allied Security Trust as being complementary to each other.

"While Unified Patents focuses more on challenging assets held by nonpracticing entities, we are watching patents that are up for sale and trying to keep them from getting into the hands of nonpracticing entities," she said. "The right thing to do is a combination of things. This is a complex problem, and there is no simple solution to it. Our members believe it's cheaper to buy a portfolio on the open market and avoid litigation instead of waiting until they've been sued. Inter partes reviews are not cheap. They play a valuable role, but they are not the only role."

Although courts are still seeing a steady stream of nonpracticing entity suits, each group has been successful to some extent at keeping large numbers of patents off the nonpracticing entity docket, particularly patents that would be asserted against companies that sell high-volume end products, such as cellphones and computers, according to Blaney Harper, a partner at Jones Day.

"It is not a realistic goal for these groups to stop nonpracticing entity litigation because the patent space is just too big and diverse for the groups to realistically cover," he said. "I think what can be said is that these groups do offer — and have offered — a viable alternative for reducing the exposure of some companies to nonpracticing entity litigation in specific risk circumstances."

With 300,000 patents issued every year, nonpracticing entities have plenty of opportunities to pick up and assert patents, and as a result, Unified Patents will continue to play a key role in combating weak patents, according to Ambwani.

"If you look at high-tech nonpracticing entity litigation, it is ridiculously high compared to every other industry," he said. "I haven't seen a significant decrease in that litigation yet, and I don't see our model becoming any less viable."

Harper said there is always likely to be a place for industry consortiums as long as nonpracticing entity suits are around, but their utility may be reduced over time.

"The evolving state of damages law, applicability of inter partes reviews, and infringement pleadings

and defenses give companies more reasons to have less exposure to nonpracticing entities, and this will reduce the motivation to enter into the subscription models to mitigate the nonpracticing entity litigation," he said. "I am sure that the subscription services will try to change their subscription model to account for the evolving law and other factors, but I think they will be playing catch up, and the importance and applicability of the subscription service will decline over time."

--Editing by Jeremy Barker and Philip Shea.

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