

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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UNIFIED PATENTS INC.,  
Petitioner,

v.

BRADIUM TECHNOLOGIES LLC,  
Patent Owner.

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Case IPR2018-00952  
Patent 9,253,239 B2

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Before BRYAN F. MOORE, BRIAN J. McNAMARA, and  
MINN CHUNG, *Administrative Patent Judges*.

Opinion of the Board filed by *Administrative Patent Judge* MOORE

Opinion Dissenting filed by *Administrative Patent Judge* CHUNG

DECISION  
Granting Institution of *Inter Partes* Review  
35 U.S.C. § 314

## BACKGROUND

Unified Patents, Inc. (“Petitioner”) filed a petition, Paper 2 (“Pet.”), to institute an *inter partes* review of claims 1–25 (the “challenged claims”) of U.S. Patent No. 9,253,239 B2 (“the ’239 Patent”). 35 U.S.C. § 311. Bradium Technologies LLC (“Patent Owner”) timely filed a Preliminary Response, Paper 20 (“Prelim. Resp.”), contending that the Petition should be denied as to all challenged claims. We have authority to determine whether to institute an *inter partes* review under 37 C.F.R. § 42.4(a) and 35 U.S.C. § 314, which provides that an *inter partes* review may not be instituted unless the information presented in the Petition “shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” Having considered the arguments and the associated evidence presented in the Petition and the Preliminary Response, for the reasons described below, we institute *inter partes* review.

In its Preliminary Response, Patent Owner asserted Petitioner had not named all real parties-in-interest. Prelim. Resp. 1. In accordance with our authorization (see Papers 23 and 27) Petitioner filed a Reply (Paper 26, “RPI Reply”) and Patent Owner filed a Sur-Reply (Paper 29, “RPI Sur-Reply”) on that the real parties-in-interest issue.

## REAL PARTIES IN INTEREST

Patent Owner argues that the Petition should be denied because Petitioner failed to identify all real parties-in-interest (RPIs). Prelim. Resp. 9. In accordance with 35 U.S.C. § 312(a)(2) and 37 C.F.R. § 42.8(b)(1), Petitioner identifies itself, Unified Patents, Inc., as the only real-party-in-

interest (“RPI”). Pet. 2. Petitioner Unified Patents’s business model includes membership by companies. Prelim. Resp. 7. Patent Owner asserts that two members of Petitioner are RPIs that should have been named in the Petition. RPI Sur-Reply 2. Specifically, Patent Owner does not contend that all members of Petitioner are RPIs, rather Patent Owner “contends only that two specific members of Unified . . . are RPIs.” *Id.* Based on that failure to name those alleged RPIs, Patent Owner requests that we dismiss the Petition. Prelim. Resp. 1, 10. Even if the members of Petitioner that Patent Owner cites as potential RPIs should be named RPIs, failure to identify them as such at the time the Petition was filed does not require us to terminate the proceeding. This is because Patent Owner does not allege that inclusion of any specified member of Petitioner as an RPI would have barred the Petition under 35 U.S.C. § 315. RPI Sur-Reply 6.

Aside from a bar defense, under the Board’s precedential decision in *Lumentum Holdings, Inc. v. Capella Photonics, Inc.*, our jurisdiction to consider a petition does not require a “correct” identification of all RPIs in a petition. Case IPR2015–00739, slip op. at 6 (PTAB Mar. 4, 2016) (Paper 38) (precedential); *see also Blue Coat Sys., Inc. v. Finjan, Inc.*, Case IPR2016–01444, slip op. at 10 (PTAB July 18, 2017) (Paper 11) (“Evidence [of failure to identify all RPIs] is, at best, suggestive of an issue that is not jurisdictional.”). Indeed, later PTAB decisions indicate that a petition may be corrected after institution of trial to add a real party in interest if warranted without assigning a new filing date to the petition. *E.g., Axon EP, Inc. v. Derrick Corp.*, Case IPR2016–00642, slip op. at 3 (PTAB Nov. 21, 2016) (Paper 17).

*Principles of Law*

A petition for *inter partes* review “may be considered only if . . . the petition identifies all real parties-in-interest.” 35 U.S.C. § 312(a)(2). When a patent owner provides sufficient evidence prior to institution that reasonably brings into question the accuracy of a petitioner’s identification of RPIs, the overall burden remains with the petitioner to establish that it has complied with the statutory requirement to identify all RPIs. *Zerto, Inc. v. EMC Corp.*, Case No. IPR2014-01295, slip op. at 6–7 (PTAB Feb. 12, 2015) (Paper 31).

“[A]t a general level, the ‘real party-in-interest’ is the party that desires review of the patent.” Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,759 (Aug. 14, 2012) (“Trial Practice Guide”). “Whether a party who is not a named participant in a given proceeding nonetheless constitutes a ‘real party-in-interest’ . . . to that proceeding is a highly fact-dependent question” with no “bright line test,” and is assessed “on a case-by-case basis.” Trial Practice Guide, 48,759 (citing *Taylor v. Sturgell*, 553 U.S. 880, 893–95 (2008)). A common consideration is whether the non-party exercised or could have exercised control over the proceeding. Trial Practice Guide, 48,759 (citing Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* (“Wright & Miller”) § 4451). The concept of control generally means that “the nonparty has the actual measure of control or opportunity to control that might reasonably be expected between two formal coparties.” *Id.*

Actual control is not the only measure— “[d]etermining whether a non-party is a ‘real party in interest’ demands a flexible approach that takes into account both equitable and practical considerations, with an eye toward

determining whether the non-party is a clear beneficiary that has a preexisting, established relationship with the petitioner.” *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336, 1351 (Fed. Cir. 2018) (“*AIT*”). Relevant factors in the RPI analysis include “Party A’s relationship with the petitioner; Party A’s relationship to the petition itself, including the nature and/or degree of involvement in the filing; and the nature of the entity filing the petition.” Trial Practice Guide, 48,760.

We acknowledge that, prior to *AIT*, Board decisions cited by Patent Owner found Petitioner’s members were not RPIs primarily due to a lack of control over the IPR by the member.<sup>1</sup> Prelim. Resp. 10. We also acknowledge two Board cases decided post-*AIT* cited by Patent Owner find Petitioner’s members are not RPIs under the broader *AIT* rubric.<sup>2</sup> RPI Sur-Reply 4. Patent Owner asserts these cases were wrongly decided. *Id.* None of those cases is designated precedential and we decide this case on its own merits.

### *Arguments*

There appears to be no dispute to Petitioner’s assertion that it “controlled, directed and funded this petition, did not communicate with any

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<sup>1</sup> For example, Patent Owner cites *Unified Patents Inc. v. Qurio Holdings, Inc.*, IPR2015-01940, Paper 7 at 26 (PTAB Apr. 13, 2016) (Comcast not real party-in-interest due to lack of “actual proof that Comcast exerted control over the Petition.”) and *Unified Patents Inc. v. American Vehicular Sciences, LLC*, IPR2016-00364, Paper 13 at 6 (PTAB June 27, 2016) (“Patent Owner provides no evidence that any other entity actually is controlling this particular proceeding, or is providing direct financing for this particular proceeding.”)

<sup>2</sup> Patent owner cites *Unified Patents Inc. v. Realtime Adaptive Streaming, LLC*, IPR2018-00883 (Oct. 11, 2018); *Unified Patent v. Plectrum LLC*, IPR 2017-01430 (Paper 30, Nov. 13, 2018).

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