

3 Questions For Unified Patents CEO Post-Oil States (Part II)

Unified's CEO has graciously agreed to a written interview -- one that's timely in the immediate aftermath of the Supreme Court's recent rulings on the constitutionality and implementation of IPRs.

By GASTON KROUB
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In last week's column, I presented Part I of my interview with the CEO of Unified Patents, Kevin Jakel. What follows are Kevin's answers to my other two questions. As usual, I have added some brief commentary to Kevin's answers below, but have otherwise presented his answers as he provided them.

- 2. How does Unified navigate the interests of its members in situations where it has to deal with companies named as defendants in parallel district court proceedings? Is it important that Unified act completely independent of them to avoid time-bar issues?*

KJ: *Inter partes* review (IPR) proceedings, like reexamination and reissue protests, are an affordable statutory means to challenge patents of questionable merit. Of course, legal rules concerning estoppel, time bars, and real party-in-interest (RPI) are important issues considered any time an IPR is filed. As a NPE-deterrence solution whose 200+ members are often targeted by NPEs with demand letters and in district court proceedings, Unified Patents is well-aware of

these issues, and has carefully structured our solution to comply with all of the existing legal requirements to file administrative challenges as the sole RPI. Those requirements have been carefully articulated by the Patent Trial and Appeal Board in regulation, precedent, and practice, as was recently endorsed by the Federal Circuit in *Wi-Fi One v. Broadcom* on April 20. It has been our practice since the beginning to be as forthright as possible about our business model, as cooperative as possible, to seek the Board's guidance, and to err on the side of caution, given the *sui generis* nature of the model. And through almost six years and over 110 challenges, Unified has never lost a real party-in-interest challenge. We think that's in part because we laid down strict internal guidelines from the get-go that (1) Unified alone independently makes all decisions regarding any challenge proceeding (and will neither confirm nor deny whether it is may challenge a patent, will not discuss ongoing matters, and keeps separation between counsel and the membership), (2) Unified alone bears all costs of any such proceeding, and (3) while Unified's members pay annual subscription fees in addition to Unified's other revenue, members have no control over when, how, or even if Unified spends its revenue, both that received from its members and otherwise. By strictly adhering to these self-imposed guidelines, Unified alone controls, directs, and funds its challenges and other efforts, and, therefore, is the only RPI.

This complete independence is one of the unique advantages Unified uses to deter NPEs from monetizing overbroad or questionable patent claims or coming in with settlement demands priced below the cost of any one party's defense costs. Independence from our members allows Unified's talented legal team to respond quickly and strategically to challenge patents of poor quality, to counter the tragedy-of-the-commons problems prevalent in joint defense situations, and to reduce abusive NPE leverage, litigation, and nuisance settlement cost. It is not easy doing business this way, but the guidelines Unified abides by ensure our independence from our members and allow us to deliver true across-the-board deterrence against NPE litigation, avoid the tragedy-of-the-commons problem, and promote real innovation.

GK: Anyone doubting the scale and sophistication of Unified's operation should carefully consider Kevin's response. The PTAB has not been shy about issuing rulings interpreting their mandate broadly, while at the same time demanding transparency when it comes to real-party-in-interest issues. Accordingly, Unified's ability to successfully navigate the Scylla & Charybdis of independence as part of its business model is impressive, regardless of whether you are a United fan or foe.

- 3. While IP becomes ever more important in a macro sense in terms of value-creation for companies over a host of industries, there is no doubt that patent values have suffered since the passage of the AIA, and that many savvy investors categorize the majority of issued patents as a form of distressed asset. How do you approach the whole issue of patent valuation, and has Unified ever considered expanding into patent valuation?*

KJ: The AIA has undoubtedly impacted the way patents are valued today, based in part by old valuations reflecting the high cost of defending against patent litigation. Attempts to measure that impact, however, are difficult and have led some to jump to conclusions that are inaccurate at best and deceptive at worst. Before addressing the impact that these proceedings have had on patent value, it is worth taking a few moments to consider the raw data.

First, the often-repeated claim that the PTAB is a patent “death squad” that invalidates upwards of 80 percent of patents it reviews is simply incorrect. According to USPTO, almost half of petitions settle and are terminated, just over half of petitions are instituted (62%), and of those making it to final written decision, roughly 68% result in claims being cancelled. That means that roughly 40% of claims challenged in IPR petitions that do not settle result in a Final Written Decision holding one or more claims unpatentable. (PTAB Statistics (Feb. 28, 2018)). This is on a par with (and slightly lower than) both *inter-* and *ex parte* reexamination statistics, and demonstrates means that the PTAB is efficiently working to resolve disputes involving patentability at a fraction of the cost and time of district court litigation. It is also important to note that IPRs are themselves expensive still, and are selectively filed against, in turn, a self-selected group of patents, with petitioners who file generally possessing prior art and unpatentability arguments worthy of the cost, time, effort, and attendant risk of filing a challenge. While the PTAB does (and should!) depress the value of patents and patent families containing unpatentable claims, it has not slowed the rate of settlement, which is far higher in the post-AIA era. It has simply balanced the scales a bit, resulting in significantly more patents being licensed without IPRs being filed against them and in many cases without litigation ever taking place.

Second, it should be noted that traditional measures of patent value do not account for patentability. This is because pre-AIA, any determination of a patent’s validity took on average 2-3 years in district court — not to mention millions of dollars in legal fees. With the advent of IPRs, patents of dubious quality now face downward pressures on once-illusory valuation due to the lower cost and (at least relative) ease of checking patentability through the PTAB. Patents can now receive a determination of a patent’s probable patentability from the Patent Office within roughly 6 months (at the institution decision) at a fraction of the old transaction cost. As a result, the value of patents with questionable patentability now reflects this new reality.

Opponents of the AIA argue that IPRs make it easier to challenge patent claims, thereby reducing the value of patents and harming innovation. Viewed in isolation, this argument may seem reasonable, but only if you accept that unpatentable, improperly issued patents should have had value in the first place. But IPRs created no new statutory grounds of challenge; they created procedures to reduce transaction costs and delay before deciding those existing grounds. Looking at value broadly, it could just as easily be said that IPRs have increased the value of strong, valid patents by reducing the volume and value of improperly granted “bad” patents.

GK: I appreciate Kevin’s perspective, even if I don’t share his views exactly. Where I wholeheartedly agree, however, is that non-IPRed patents do not offer the same valuation certainty as those that have survived the process. Further, if you accept that the floor value for the small minority of patents that end up licensed or litigated is a discount of the expected litigation cost, then it is no surprise that the cost savings of IPR over district court have lowered that floor. At the same time, patents that do survive IPR do have a better chance of reaching their expected value ceiling, and as such IPRs can also be considered a value-validating — or even value-establishing — mechanism for patents, even as the process proves that the value of some patents is zero.

My thanks to Kevin and his team for the insights and cooperation, and I know they will continue to play an outsized role in the development of IPR jurisprudence going forward. I am always open to conducting interviews of this type with other IP thought leaders, so feel free to reach out if you have a compelling perspective to offer or someone you suggest I interview.

Please feel free to send comments or questions to me at gkroub@kskiplaw.com or via Twitter: [@gkroub](https://twitter.com/gkroub). Any topic suggestions or thoughts are most welcome.

*Gaston Kroub lives in Brooklyn and is a founding partner of **Kroub, Silbersher & Kolmykov PLLC**, an intellectual property litigation boutique, and **Markman Advisors LLC**, a leading consultancy on patent issues for the investment community. Gaston's practice focuses on intellectual property litigation and related counseling, with a strong focus on patent matters. You can reach him at gkroub@kskiplaw.com or follow him on Twitter: [@gkroub](https://twitter.com/gkroub).*