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UNCERTAINTY ABOUT REAL PARTIES IN INTEREST AND PRIVILEGE IN AIA TRIALS

EVAN DAY, KEVIN PATARIU & BING AI*

Since the 2011 Leahy-Smith America Invents Act (AIA) created administrative trial proceedings (“AIA trials”) at the Patent Trial and Appeal Board (PTAB) of the U.S. Patent and Trademark Office, the PTAB has been one of the busiest patent litigation venues in the U.S. with nearly eight thousand petitions for AIA trials filed so far.¹ Congress imposes strict limits on the use of AIA trials to further the goal of providing a “cost effective alternative to formal litigation”² while reducing “the ability to use post-grant procedures for abusive serial challenges to patents.”³ To achieve such goals, the AIA limits certain actions that can be taken by a petitioner, a real party in interest (RPI) or party in privity with the petitioner. Under 35 U.S.C. § 315(b), a party sued for patent infringement may not file a petition for IPR of a patent more than one year after service of the complaint, and this time bar also applies to an RPI or party in privity with the petitioner.⁴ In addition, the AIA’s estoppel provisions limit the ability of the petitioner, an RPI or privity of the petitioner, to raise certain invalidity issues in another AIA trial before the PTAB or a proceeding before a district court and the International Trade Commission (ITC).⁵ Notably, AIA trials may impact district court patent litigation through stays of litigation, dismissal of asserted claims found

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1. The Patent Office has been receiving between one hundred and two hundred new petitions for AIA trials each month in recent years. As of December 31, 2017, a total of 7,930 petitions were filed. *See UNITED STATES PATENT AND TRADEMARK OFFICE, TRIAL STATISTICS: IPR, PGR, CBM, 3* (2017), https://www.uspto.gov/sites/default/files/documents/Trial_Statistics_2017-12-31.pdf.

2. 157 CONG. REC. S951 (daily ed. Feb. 28, 2011) (Statement of Sen. Hatch).

3. 157 CONG. REC. S952 (daily ed. Feb. 28, 2011) (Statement of Sen. Grassley).

4. 35 U.S.C. § 315(b) (2012).

5. 35 U.S.C. § 315(e) (petitioner, RPI, or privity estopped from asserting before Patent Office, in civil action, or ITC proceeding invalidity grounds that were raised or reasonably could have been raised during IPR resulting in final written decision) and 325(e) (same for post-grant review). The AIA also provides a more limited estoppel against a Covered Business Method petitioner in district court and ITC proceedings. *See Leahy-Smith America Invents Act*, Pub. L. No. 112-29, 125 Stat. 284. §§ 18(a)(1)(D), 18(a)(1)(A).

unpatentable by the PTAB, estoppel against defendants raising certain invalidity grounds after PTAB final written decisions, and more.⁶ Accordingly, properly identifying an RPI or privity of the petitioner is important to parties on both sides of a proceeding before the PTAB, a district court or the ITC.

Uncertainty over the meaning and scope of the “real party in interest” or “party in privity” has led to frequent disputes, particularly where the party filing an IPR has some relationship to a party sued in a related lawsuit.⁷ While the law regarding this issue has so far developed, in the main, through non-precedential decisions by individual PTAB panels, the Court of Appeals for the Federal Circuit recently decided *en banc* that it had jurisdiction to review the issue.⁸ As a result, patent practitioners should expect more clarity, or at least more binding precedent, as to when a defendant in an infringement lawsuit is an RPI or in privity with the petitioner in an AIA trial.⁹

The AIA requires a petition for an AIA trial to identify “all real parties in interest”¹⁰ and to certify that the petitioner is not barred or estopped from filing the petition due to any RPI or privity relationship.¹¹ Such requirements assist the PTAB in identifying conflicts and ensures proper application of estoppel provisions precluding an RPI or privity from making invalidity arguments to the PTAB.¹² The PTAB has said, in a precedential decision, that the statutory requirement to name real parties in interest is not jurisdictional, and, therefore, the PTAB has discretion to allow parties to correct defects in the identification of RPIs without changing the filing date.¹³ However, if the

6. Michael O. Warnecke, *Interactions between PTAB Proceedings and Civil Actions*, in ANATOMY OF A PATENT CASE 177–86 (Harry J. Roper, et al., eds., 3d ed. 2017).

7. See generally Amanda Tessar, et al., *Best practices for IPR proceedings and real party in interest*, WORLD INTELLECTUAL PROPERTY REVIEW (June 12, 2016), <https://www.worldipreview.com/article/best-practices-for-ipr-proceedings-and-real-party-in-interest> [hereinafter *Best Practices*]; Amanda Tessar, et al., *Real Parties In Interest: Proceed With Caution*, WORLD INTELLECTUAL PROPERTY REVIEW (Aug. 11, 2016), <https://www.worldipreview.com/article/real-parties-in-interest-proceed-with-caution> [hereinafter *Real Parties*].

8. *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364, 1365 (Fed. Cir. 2018).

9. On the eve of this publication, the Federal Circuit issued the panel opinion in *Wi-Fi One* following remand of the case from the *en banc* court. See *Wi-Fi One, LLC v. Broadcom Corp.*, No. 15-1944 ___ F.3d ___ (Fed. Cir. Apr. 20, 2018). In its newly issued opinion, the court discussed, at length, the legal standards that the PTAB has to-date applied in its the RPI and privity analyses. The court generally approved of the PTAB’s legal standards and the application of those standards to the facts of *Wi-Fi One*. Thus, there does not appear to be any change in law that should be expected, at least in the short-term, now that the Federal Circuit is exercising judicial review over this subject matter.

10. 35 U.S.C. §§ 312(a)(2), 322(a)(2).

11. 35 U.S.C. §§ 315(a)(1), (b), (c)(1), 325(e)(1); see also 37 C.F.R. §§ 42.73(d)(1), 42.101, 42.201.

12. Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,759 (Aug. 14, 2012) (codified at 37 C.F.R. pt. 42).

13. *Lumentum Holdings, Inc. v. Capella Photonics, Inc.*, IPR2015-00739, Paper 38 at 4–5 (P.T.A.B. Mar. 4, 2016) (citing *Elekta, Inc. v. Varian Med. Sys., Inc.*, IPR2015-01401, Paper 19 (P.T.A.B. Dec. 31, 2015)).

PTAB finds that an unnamed party subject to the § 315(b) time bar is an RPI or in privity with the petitioner, the PTAB will either decline to institute an IPR or, if an IPR has already been instituted, terminate the IPR.¹⁴ Additionally, as discussed above, a district court or an ITC administrative law judge may also need to determine if a party to a civil action or an ITC investigation is an RPI or privity subject to the estoppel triggered by an AIA trial concluded with a final written decision.

I. HOW DOES THE PTAB DEFINE RPI AND PRIVACY?

The AIA generally defines the petitioner to be “a person who is not the owner of a patent,”¹⁵ but is silent on the definition of an RPI and a privity. Like the courts, the PTAB relies on the common law to supply these definitions. According to PTAB regulations, the RPI under § 315(b) is “the party that desires review of the patent,” which may be the petitioner itself or “the party or parties at whose behest the petition has been filed.”¹⁶ The statutory bar of § 315(b) “is analogous to the common-law doctrines of claim preclusion and issue preclusion, which ‘preclude parties from contesting matters that they have had a full and fair opportunity to litigate’”¹⁷ Therefore, the PTAB will “look[] to these doctrines of preclusion in interpreting the language of §315(b).”¹⁸

The PTAB’s Office Patent Trial Practice Guide explains that whether a party not named in a petition nonetheless constitutes an RPI or is privity to that proceeding is a “highly fact-dependent question[]” that “will be handled by the Office on a case-by-case basis,” based on the framework set forth by the Supreme Court in *Taylor v. Sturgell*.¹⁹ In *Taylor*, the Court, although acknowledging that it was not establishing a “definitive taxonomy,” identified the following factors as relevant to the question of whether a third party is a privity:

1. Whether the third party agrees to be bound by the determination of issues in the proceeding;

14. See, e.g., *Corning Optical Commc’ns RF, LLC v. PPC Broadband, Inc.*, IPR2014-00440, Paper 68 at 26 (P.T.A.B. Aug. 18, 2015); *Atlanta Gas Light Co. v. Bennett Regulator Guards, Inc.*, IPR2013-00453, Paper 88 at 17 (P.T.A.B. Jan. 6, 2015).

15. 35 U.S.C. § 311(a) (2012).

16. Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,759 (Aug. 14, 2012).

17. *Aruze Gaming Macau, Ltd. v. MGT Gaming, Inc.*, IPR2014-01288, Paper 13 at 7–8 (P.T.A.B. Feb. 20, 2015) (quoting *Montana v. United States*, 440 U.S. 147, 153–54 (1979)).

18. *Id.* at 7.

19. Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,759 (Aug. 14, 2012) (citing *Taylor v. Sturgell*, 553 U.S. 880 (2008)).

2. Whether a pre-existing substantive legal relationship with the party named in the proceeding justifies binding the third party;
3. Whether, “in certain limited circumstances”, the third party is adequately represented by someone with the same interests;
4. Whether the third party exercised or could have exercised control over the proceeding;
5. Whether the third party is bound by a prior decision and is attempting to rehear the matter through a proxy; and
6. Whether a statutory scheme forecloses successive hearing by third parties.²⁰

The PTAB frequently focuses on the fourth factor (control) as all but determinative.²¹ The PTAB has explained that the “central” factor to its determination is whether “a party other than the named petitioner was controlling, or capable of controlling, the proceeding before the Board.”²² A party need not exercise complete control of a proceeding to be considered an RPI; the degree of control (or funding) requires “consideration of the pertinent facts.”²³ The PTAB’s regulations explain that “it should be enough that the nonparty has the actual measure of control or opportunity to control that might reasonably be expected between two formal co-parties.”²⁴ In other words, the PTAB inquires “whether someone other than the named petitioner is litigating through a proxy.”²⁵

While RPI and privity issues are often discussed together and frequently overlap, even in PTAB regulations and cases, they are not the same. Privity is a more “expansive” concept, “encompassing parties that do not necessarily need to be identified in the petition” as an RPI.²⁶ The PTAB has explained that while the RPI inquiry “focuses on a party’s relationship to a *proceeding*,

20. Taylor v. Sturgell, 553 U.S. 880, 893–95 (2008).

21. See, e.g., *Aruze Gaming*, IPR2014-01288, Paper 13 at 11; *Zoll Lifecor Corp. v. Phillips Elecs. N. Am. Corp.*, IPR2013-00609, Paper 15 at 10–11, 14–15 (P.T.A.B. Mar. 20, 2014); *Atlanta Gas Light Co. v. Bennett Regulator Guards, Inc.*, IPR2013-00453, Paper 88 at 9 (P.T.A.B. Jan. 6, 2015).

22. *Aruze Gaming*, IPR2014-01288, Paper 13 at 11.

23. *Id.* at 11 (quoting Office Patent Trial Practice Guide, Fed. Reg. 48,756, 48,760 (Aug. 14, 2012)).

24. *Id.* at 12 (quoting Office Patent Trial Practice Guide Fed. Reg. 48,756, 48,759 (Aug. 14, 2012)).

25. *Id.* (internal quotations omitted).

26. Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,759 (Aug. 14, 2012).

the privity inquiry focuses on the relationship between *parties*.²⁷ For example, two parties may be in privity of contract with respect to a product accused of infringement.²⁸

When privity issues arise in the context of § 315(b)'s time bar, the PTAB considers whether the "relationship between the party to be estopped and the unsuccessful party *in the prior litigation* . . . is sufficiently close so as to justify application of the doctrine of collateral estoppel."²⁹ Accordingly, PTAB decisions discussing privity have typically looked at the relationship between the petitioner and the alleged privy of the petitioner at the time the latter was served with a complaint for infringement.³⁰ Therefore, as a practical matter, while RPI and privity issues tend to overlap, the PTAB will look at the relationship between parties in regard to the filing of the petition for IPR itself to determine whether a third party is an RPI, and the relationship between parties in regard to prior litigation to determine whether a third party is a privy.

II. TYPES OF RELATIONSHIPS CAUSING RPI AND PRIVACY DISPUTES

The most common scenarios in which the PTAB has addressed RPI and privity issues include (1) co-defendants in litigation, (2) patent defense organizations, (3) corporate relationships, and (4) customer/supplier or indemnitor/indemnitee relationships.³¹ The Office Patent Trial Practice Guide itself cautions that participation in a joint defense group does not create an RPI or privity relationship,³² and PTAB decisions have generally found that a co-defendant is not an RPI or privy absent a specific connection to the petition

27. *Aruze Gaming*, IPR2014-01288, Paper 13 at 13 (emphasis in original) (citing *Int'l Nutrition Co. v. Horphag Research, Ltd.*, 220 F.3d 1325, 1329 (Fed. Cir. 2000)).

28. *Id.* at 13-14 (citing *In re Cyclobenzaprine Hydrochlorine Extended-Release Capsule Patent Litig.*, 504 F. App'x 900, 906 (Fed. Cir. 2013)).

29. Office Patent Trial Practice Guide, 77 Fed. Reg. 48756, 48,759 (Aug. 14, 2012) (emphasis added), (quoting 154 CONG. REC. S9987 (daily ed. Sept. 27, 2008) (statement of Sen. Kyl) (internal citations omitted)).

30. See, e.g., *Arris Grp., Inc. v. C-Cation Techs., LLC*, IPR2014-00746, Paper 22 at 9 (P.T.A.B. Nov. 24, 2014) ("Patent Owner does not provide evidence sufficient to demonstrate that, *at the time of service of the 2011 complaint* . . . Petitioner exercised control or could have exercised control over [alleged privy]'s participation in the 2011 district court proceeding") (emphasis added); *Aruze Gaming*, IPR2014-01288, Paper 13 at 15-16 (PTAB cases "focus on the relationship between the parties *in the context of the prior lawsuit*") (emphasis added).

31. See *Best Practices*, *supra* note 7.

32. Office Patent Trial Practice Guide, 77 Fed. Reg. 48756, 48,760 (Aug. 14, 2012).

at issue.³³ As for participation in patent defense organizations, merely funding such organizations does not make a party an RPI;³⁴ however, the PTAB has also found that a time-barred litigation defendant, whose arrangements with a patent defense organization gave them the ability to suggest patents to challenge, was an undisclosed RPI to a petition brought by the organization.³⁵

Corporate affiliations create a more complicated situation, with inconsistent results from the PTAB. Common ownership or corporate officers between related entities does not necessarily create privity or an RPI relationship, absent evidence that the corporate form has been ignored.³⁶ The use of common counsel between related entities also does not automatically lead to the conclusion that a corporate affiliate of petitioner was an RPI or in privity.³⁷ However, in other cases, the use of common in-house and outside counsel, as well as overlapping corporate officers, has led the PTAB to conclude that lines of corporate separation were sufficiently blurred that related corporate entities should be considered RPIs.³⁸ Additionally, the PTAB may rely on the involvement of a related company or its officers in licensing or settlement discussions as indicative of an RPI relationship.³⁹ Within the multi-factor legal framework under *Taylor*, the PTAB's case-by-case approach has generated divergent and fact-specific PTAB panel opinions about related companies, making it difficult for litigants to predict the result in any particular case involving corporate affiliations.

33. See, e.g., *Weatherford Int'l, LLC v. Packers Plus Energy Servs., Inc.*, IPR2016-01517, Paper 23 at 11–15 (P.T.A.B. Feb. 23, 2017); *Syntroleum Corp. v. Neste Oil Oyj*, IPR2013-00178, Paper 22 at 7 (P.T.A.B. Sept. 4, 2013); *Denso Corp. v. Beacon Navigation GmbH*, IPR2013-00026, Paper 34 at 10–11 (P.T.A.B. Mar. 14, 2014).

34. See, e.g., *Unified Patents Inc. v. Plectrum LLC*, IPR2017-01430, Paper 8 at 8–10 (P.T.A.B. Nov. 14, 2017).

35. *RPX Corp. v. VirnetX, Inc.*, IPR2014-00171, Paper 49 (P.T.A.B. June 5, 2014) (public redacted version available as Paper 57, July 14, 2014).

36. *Aruze Gaming Macau, Ltd. v. MGT Gaming, Inc.*, IPR2014-01288, Paper 13 at 19 (P.T.A.B. Feb. 20, 2015) (citing *Gillig v. Nike, Inc.*, 602 F.3d 1354, 1362 (Fed. Cir. 2010)); *LG Display Co., Ltd. v. Innovative Display Techs. LLC*, IPR2014-01362, Paper 12 at 5–6 (P.T.A.B. Mar. 2, 2015); *TRW Auto. U.S. LLC v. Magna Elecs. Inc.*, IPR2014-01351, Paper 7 at 5–8 (P.T.A.B. Feb. 10, 2015).

37. *Aruze Gaming*, IPR2014-01288, Paper 13 at 20.

38. *Corning Optical Commc'ns RF, LLC v. PPC Broadband, Inc.*, IPR2014-00440, Paper 68 at 19 (P.T.A.B. Aug. 18, 2015); *Atlanta Gas Light Co. v. Bennett Regulator Guards, Inc.*, IPR2013-00453, Paper 88 at 17 (P.T.A.B. Jan. 6, 2015).

39. *Paramount Home Entm't Inc. v. Nissim Corp.*, IPR2014-00961, Paper 11 at 8–9 (P.T.A.B. Dec. 29, 2014); *Zoll Lifecor Corp. v. Phillips Elecs. N. Am. Corp.*, IPR2013-00609, Paper 15 at 9–10 (P.T.A.B. Mar. 20, 2014).

Finally, customer/supplier and indemnity relationships generally are insufficient to show an RPI or privity relationship,⁴⁰ unless the evidence shows that the indemnitor pays for and controls the IPR.⁴¹

III. THE FEDERAL CIRCUIT STEPS IN

Although the case-by-case determinations of RPI and privity issues by separate PTAB panels have led to unpredictability for PTAB practitioners and their clients, the Federal Circuit had, until recently, held that it could not review such issues.⁴² The critical question was the interpretation of 35 U.S.C. § 315(d), which states that “[t]he determination by the Director [of the USPTO] whether to institute an inter partes review under this section shall be final and nonappealable.”⁴³ In *Achates Reference Publishing, Inc. v. Apple, Inc.*, the Federal Circuit held that § 315(d) “prohibits this court from reviewing the Board’s decision to initiate IPR proceedings based on its assessment of the time-bar of § 315(b),” and therefore refused to consider the Patent Owner’s argument that the petitioner (Apple) should have been time-barred due to earlier lawsuits against developers who made apps for Apple products.⁴⁴ The panel held that the words “under this section” in § 315(d) modified the word “institute” and therefore specifically prohibited the Federal Circuit from reviewing the PTAB’s decision that the petition was not time-barred.⁴⁵

Achates left RPI and privity issues unreviewable by the Federal Circuit, and therefore the exclusive province of the PTAB, until the Federal Circuit revisited its interpretation of the statute. In *Wi-Fi One, LLC v. Broadcom Corp.*, the petitioner filed an IPR several years after the patent owner had filed lawsuits against multiple defendants, alleging that transceivers in the defendants’ products made by the petitioner infringed a patent.⁴⁶ After the PTAB invalidated the patent, the patent owner argued on appeal that the petition should have been time-barred because of the relationship between the petitioner and the prior defendants.⁴⁷ In a divided opinion, a majority of the

40. See, e.g., *Nissan N. Am., Inc. v. Diamond Coating Tech., LLC*, IPR2014-01546, Paper 22, (P.T.A.B. Apr. 28, 2015); *Petroleum Geo-Servs. Inc. v. WesternGeco LLC*, IPR2014-00689, Paper 101 at 42-47 (P.T.A.B. Dec. 15, 2015).

41. *First Data Corp. v. Cardsoft, LLC*, IPR2014-00715, Paper 9 at 7–8 (P.T.A.B. Oct. 17, 2014).

42. *Achates Reference Publ’g, Inc. v. Apple, Inc.*, 803 F.3d 652, 658 (Fed. Cir. 2015).

43. *Id.* at 655, 658.

44. *Id.* at 653–54, 658.

45. *Id.* at 658.

46. 837 F.3d 1329, 1332 (Fed. Cir. 2016).

47. *Id.*

Federal Circuit panel followed *Achates* and held that § 314(d) prohibited appellate review of the Board’s assessment of the § 315(b) time bar.⁴⁸

However, the Federal Circuit granted *en banc* review and overruled *Achates*.⁴⁹ The majority applied a “strong presumption” favoring judicial review of agency actions.⁵⁰ In view of that presumption, the majority narrowly interpreted the § 314(d) restriction on judicial review to preclude only review of the “threshold” determination under § 314(a), which requires the PTAB to determine whether the petition had shown a “reasonable likelihood” of prevailing with respect to at least one challenged patent claim.⁵¹ Because the question of whether a petition is timely filed under § 315(b) is unrelated to that preliminary determination, even though it is decided in the decision to institute, and is a “condition precedent” to the PTAB’s statutory authority to act, the majority ruled that judicial review of timeliness under § 315(b) was not precluded by § 314(d).⁵² However, the *en banc* court did not address the merits of Wi-Fi One’s time bar, remanding the issue instead to the merits panel.⁵³

IV. UNRESOLVED ISSUES

Many issues remain unresolved following the *Wi-Fi One en banc* decision. Although it is clear after *Wi-Fi One* that patent owners may appeal adverse time bar decisions, the Federal Circuit will need to resolve whether *petitioners* may file such appeals.⁵⁴ The AIA allows any party dissatisfied with a *final written decision* in an IPR to appeal.⁵⁵ However, PTAB rulings against petitioners over RPI and privity issues typically occur in denials of institution⁵⁶ or, if an IPR has already been instituted, in a decision to dismiss or terminate the IPR,⁵⁷ rather than in a final written decision. Petitioners who have not been sued or otherwise directly accused of infringement may also have difficulty establishing Article III standing to appeal an adverse decision

48. *Id.* at 1333.

49. *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364, 1371–75 (Fed. Cir. 2018).

50. *Id.* at 1372 (citing *Cuozzo Speech Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016)).

51. *Id.* at 1372–73.

52. *Id.* at 1373–75.

53. *Id.* at 1375.

54. As mentioned, the appellant in *Wi-Fi One* was the patent owner, after a final written decision.

55. 35 U.S.C. § 319 (2012).

56. *See, e.g., Zoll Lifecor Corp. v. Phillips Elecs. N. Am. Corp.*, IPR2013-00609, Paper 15 at 16–7 (P.T.A.B. Mar. 20, 2014).

57. *See, e.g., Atlanta Gas Light Co. v. Bennett Regulator Guards, Inc.*, IPR2013-00453, Paper 88 at 17 (P.T.A.B. Jan. 6, 2015) (terminating IPR and vacating Decision to Institute).

on RPI or privity grounds.⁵⁸ In some scenarios (such as petitions by patent defense organizations), the petitioner itself may lack standing to appeal even if another party that would have such standing (*e.g.*, an accused infringer in a patent lawsuit) was found to be an RPI. *Wi-Fi One*'s remand panel further needs to determine the standard it will apply to RPI and privity questions, particularly when the § 315(b) time bar is implicated. Although one judge on the original panel was prepared to find that the petitioner was neither in privity with the defendants in the civil case nor an RPI in that case, the concurrence did not discuss the standard applied to reach that conclusion.⁵⁹ The Federal Circuit may also decide whether it will defer to the PTO's interpretation of the terms "real party in interest" and "privity" under *Chevron*.⁶⁰ If it does apply such deference, the PTO's guidance in the Office Patent Trial Practice Guide will continue to provide the controlling framework for RPI and privity decisions, although it is likely that future Federal Circuit decisions will provide additional guidance in specific factual situations.

58. *See, e.g.*, *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1262–63 (Fed. Cir. 2014).

59. *Wi-Fi One, LLC v. Broadcom Corp.*, 837 F.3d 1329, 1340 (Fed. Cir. 2016) (Reyna, J., concurring).

60. *See Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).