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Unified Patents Real Party-in-Interest (RPI) Decisions (/rpi/2019/6/3/unified-patents-real-party-in-interest-rpi-decisions-may-2019-update)

This post was updated May 10, 2022.

For the past decade, across more than 300 proceedings, Unified Patents has won every real party-in-interest (RPI) challenge—whether at institution, on final written decision, or before the Federal Circuit.

Unified's status as the sole RPI was challenged in its first filed IPR, where the Board held that Unified was the sole RPI. *Unified Patents Inc. v. Clouding IP, LLC*, IPR2013-00586 (<https://portal.unifiedpatents.com/ptab/case/IPR2013-00586>), Paper 9 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2013-00586%2F9>) (Mar. 21, 2014) (members were not found to be RPIs, where there was no evidence of funding or control of the particular IPR; challenged claims were later cancelled in a Final Written Decision (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2013-00586%2F37>) issued April 26, 2015). As catalogued below, Unified overcame every such challenge in the proceeding years. Today, RPI designations are rarely challenged and largely settled law.

In 2018, the Federal Circuit had their first opportunity to review the Board’s developing RPI jurisprudence in a case involving another membership organization, RPX. That opinion endorsed the Board’s long standing RPI test set forth in the Trial Practice Guide but outlined facts particular to that situation (including a potential time-bar) and characteristics of that different membership organization that merited further scrutiny on remand. See *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336 (July 9, 2018) (“*AIT*”). On remand, the PTAB investigated, *inter alia*, repeated coordination to violate a time-bar and a previous final Board decision’s implications, and determined that the organization’s client, with whom they communicated closely related to the challenge, was an RPI in that case. *RPX Corp. v. AIT, LLC*, IPR2015-01750

(<https://portal.unifiedpatents.com/ptab/case/IPR2015-01750>), Paper 128 (PTAB Oct. 2, 2020). The Board applied existing orders, precedent, and case law (the same body of law which, when applied to Unified, upheld Unified as the sole RPI) to this "highly fact-dependent question" to hold that RPX was not the sole RPI; hence, RPX's differing business model and practices resulted in a different outcome than Unified. *Id.*, Paper 128 at 6-9, 30-35; *AIT*, 897 F.3d at 1342 (citations omitted).

In every ruling following *AIT*, Unified has been found to be the sole RPI including at the Federal Circuit. As catalogued below, Unified has been distinguished from the facts of *AIT* and the practices of the organization in question. The PTAB has thoroughly reviewed this issue in numerous cases when confirming that Unified was the sole RPI. Panels have noted that, contrary to the facts present in *AIT*, where the organization sought to extricate clients from litigation by negotiating on behalf of defendants and acting as an “intermediary between patent owners and operating companies,” Unified is no dealmaking middleman, and “acts independent of its members or any other company.” *RPX Corp. v. AIT, LLC*, IPR2015-01750

(<https://portal.unifiedpatents.com/ptab/case/IPR2017-01750>), Paper 128 at 11-15. The Board has found that neither the manner of how Unified selects cases nor the business model itself render any members RPIs, and has repeatedly distinguished facts as they apply to Unified. For example, the Board has routinely found that none of Unified's members have control of, provide funding or direction to, or receive a specific benefit from the filing of a petition (e.g., to purposefully circumvent the one year time-bar). *Unified Patents Inc. v. Barkan Wireless IP Holdings, LP*, IPR2018-01186

(<https://portal.unifiedpatents.com/ptab/case/IPR2018-01186>), Paper 56 (PTAB Dec. 4, 2019); *aff'd*, 838 F'Appx 565 (Fed. Cir. 2021); *see also*

(<https://portal.unifiedpatents.com/ptab/case/IPR2019-00707>) *Velos Media, LLC*, IPR2019-00707, Paper 55 (Sept. 3, 2020)

(<https://portal.unifiedpatents.com/ptab/case/IPR2019-00707>);

(<https://portal.unifiedpatents.com/ptab/case/IPR2019-00635>) *Velos Media, LLC*, IPR2019-00635, Paper 45 (Aug. 18, 2020)

(<https://portal.unifiedpatents.com/ptab/case/IPR2019-00635>); *American Patents, LLC*, IPR2019-00482, Paper 115 (Aug 13, 2020)

(<https://portal.unifiedpatents.com/ptab/case/IPR2019-00482>).

In May of 2020, the Federal Circuit held that 35 U.S.C. § 314(d) precludes judicial review of the Board's RPI determinations under 35 U.S.C. § 312 entirely, *see ESIP Series 2, LLC v. Puzhen Life USA, LLC*

(https://cafc.uscourts.gov/sites/default/files/opinions-orders/19-1659.Opinion.5-19-2020_1590336.pdf), 958

F.3d 1378 (Fed. Cir. 2020), extending the Supreme Court's holding earlier that year that 35 U.S.C. § 315 time bar determinations were likewise unreviewable, *Thryv, Inc v. Click-To-Call Techs., LP*

(<https://www.supremecourt.gov/opinions/19pdf/18->

916_f2ah.pdf), 140 S. Ct. 1367 (2020), thus foreclosing most direct judicial review of Board RPI determinations, making it unlikely that the Federal Circuit will review or alter future board determinations.

And the Federal Circuit has repeatedly confirmed challenges to both the appealability and the underlying rulings and has summarily affirmed appeals from Unified challenges in the vast majority of cases. For example, in July 2020, the Federal Circuit’s precedential opinion in *Fall Line Patents, LLC v. Unified Patents, LLC* (<https://law.justia.com/cases/federal/appellate-courts/cafc/19-1956/19-1956-2020-07-28.html>) rejected arguments that RPI determinations were reviewable on appeal after *Thryv* (https://www.supremecourt.gov/opinions/19pdf/18-916_f2ah.pdf), with Judge O’Malley, writing for the majority, explaining that *Thryv* (https://www.supremecourt.gov/opinions/19pdf/18-916_f2ah.pdf) precluded judicial review of the PTAB’s institution-based RPI determinations.

In December 2020, the PTAB designated as precedential the *Sharkninja Operating LLC, et al. v. iRobot Corporation*, IPR2020-00734 (<https://portal.unifiedpatents.com/ptab/case/IPR2020-00734>), Paper 11 (PTAB Oct. 6, 2020) institution decision, which held that the Board need not address RPI issues as advisory opinions, so long as neither the time bar nor estoppel provisions of 35 U.S.C. § 315 are implicated. As noted below, the PTAB has since routinely cited the *Sharkninja* decision in rejecting arguments made against RPI status, including application of *Sharkninja* in the context of a final written decision. *Unified Patents, LLC v. Velos Media, LLC*, IPR2020-00352 (<https://portal.unifiedpatents.com/ptab/case/IPR2020-00352>), Paper 39 at 46–47 (PTAB June 28, 2021).

Post-AIT Decisions

Board panels have routinely denied requests for

rehearing on the issue of RPI, holding that the general benefit a member may receive from Unified's petition and their pre-existing relationship do not render the member an RPI. In addition, evidence that a company is a corporate affiliate of a Unified member is not by itself sufficient to place RPI in dispute, noting that where Respondent "looked for a connection between Member and either the challenged patent or the Petition (beyond Member's mere status as a defendant and member of Petitioner), [] it found none."

- See, e.g., *Unified Patents, LLC v. American Patents, LLC*, IPR2019-00482 (<https://portal.unifiedpatents.com/ptab/case/IPR2019-00482>), Paper 122 (PTAB Dec. 3, 2020); *id.*, Paper 115 (<https://portal.unifiedpatents.com/ptab/case/IPR2019-00482>) (PTAB Aug. 13, 2020) (final written decision); *id.*, Paper 36 (<https://portal.unifiedpatents.com/ptab/case/IPR2019-00482>) (PTAB Aug. 6, 2019) (institution decision).

Final decisions have held that Unified was the sole RPI, rejecting arguments that all zone members should be named, and have held that "Patent Owner . . . has not identified an aspect of Petitioner's business structure that we view as showing the alleged unnamed real parties in interest are clear beneficiaries with respect to this proceeding that have a preexisting, established relationship with Petitioner."

- See, e.g., *Unified Patents, LLC v. Velos Media, LLC*, IPR2019-00707 (<https://portal.unifiedpatents.com/ptab/case/IPR2019-00707>), Paper 55 (Sept. 3, 2020).

Final decisions have held repeatedly that Unified was the sole RPI, finding cases to be distinguishable from the facts in *AIT*, particularly where there was no evidence of communication between the member and Unified about the proceeding, or that the filing was made at the behest

of any member.

- See, e.g., *Unified Patents, LLC v. Uniloc 2017 LLC*, IPR2019-00453 (<https://portal.unifiedpatents.com/ptab/case/IPR2019-00453>), Paper 38 (July 22, 2020).

Final decisions have held that the general benefit members received from Unified's common practice of filing IPRs in relevant technology areas was insufficient to demonstrate a specific benefit, as discussed in *A/T*, considering evidence that Patent Owner engaged in licensing discussions with the alleged RPIs prior to Unified's petition.

- See, e.g., *Unified Patents Inc. v. Bradium Technologies LLC*, IPR2018-00952 (<https://portal.unifiedpatents.com/ptab/case/IPR2018-00952>), Paper 68 (PTAB Feb. 6, 2020); *id.*, Paper 31 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2018-00952%2F31>) at 12 (PTAB Dec. 20, 2018) (institution decision).

Final decisions that Unified properly identified itself as the sole RPI when considering that members neither had control of, provided funding or direction to Unified, nor received any specific benefit (e.g., to purposefully circumvent the one year time-bar) from the filing of the petition.

- See, e.g., *Unified Patents Inc. v. Barkan Wireless IP Holdings, LP*, IPR2018-01186 (<https://portal.unifiedpatents.com/ptab/case/IPR2018-01186>), Paper 56 (PTAB Dec. 4, 2019); *id.*, Paper 27 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2018-01186%2F27>) at 15-16 (PTAB Jan. 8, 2019) (institution decision); *aff'd*, 838 F'Appx 565 (Fed. Cir. 2021).

Institution decisions have held that Unified is the sole RPI and that the mere fact that a member asserted invalidity using the same prior art in district court after Unified filed

its petition is not enough, without more, to show a member is an RPI.

- See, e.g., *Unified Patents Inc. v. MV3Partners, LLC*, IPR2019-00474 (<https://portal.unifiedpatents.com/ptab/case/IPR2019-00474>), Paper 9 (<https://portal.unifiedpatents.com/ptab/case/IPR2019-00474>) (PTAB July 16, 2019).

Final decisions have held that a member's decision to file its own petition further supports the conclusion that Unified was not acting under the control or direction of the member.

- See, e.g., *Unified Patents Inc. v. Uniloc USA, Inc. et al.*, IPR2018-00199 (<https://portal.unifiedpatents.com/ptab/case/IPR2018-00199>), Paper 33 (<https://portal.unifiedpatents.com/ptab/case/IPR2018-00199>) (PTAB May 31, 2019).

Final decisions have held that Unified properly identified all RPIs and that a member “is not an unnamed RPI [. . .] based on any of the following: its membership with Unified; the alleged control over this IPR; or the relationship between [the member] and Unified and the alleged benefit of the IPR to [the member].”

- See, e.g., *Unified Patents Inc. v. Cellular Communications Equipment, LLC*, IPR2018-00091 (<https://portal.unifiedpatents.com/ptab/case/IPR2018-00091>), Paper 69 (<https://portal.unifiedpatents.com/ptab/case/IPR2018-00091>) (PTAB May 22, 2019).

Final decisions have held that Unified was the sole RPI and members that may benefit from Unified filing the IPR are not RPIs without showing some other evidence of, *inter alia*, a specific interest in the particular proceeding. They have held repeatedly that Unified's business model alone was not enough for a member to be found as an

alone was not enough for a member to be found as an RPI.

- See, e.g., *Unified Patents Inc. v. Universal Secure Registry LLC*, IPR2018-00067 (<https://portal.unifiedpatents.com/ptab/case/IPR2018-00067>), Paper 54 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2018-00067%2F59>) at 72-75 (PTAB May 1, 2019).

Final decisions have held that Unified's IPR was not controlled, funded, nor filed at the behest of one of its members; instead, noting that membership fees are used to fund a variety of Unified's deterrence activities ("Petitioner is not solely an inter partes review-filing entity") and distinguishing the factors at issue in the *AIT* decision.

- See, e.g., *Unified Patents Inc. v. Uniloc 2017 LLC*, IPR2017-02148 (<https://portal.unifiedpatents.com/ptab/case/IPR2017-02148>), Paper 74 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2017-02148%2F82>) at 14-24 (PTAB April 11, 2019) ("[W]e do not have evidence that Petitioner is representing any particular interest of [a particular member] here. Rather, the evidence shows Petitioner is representing the general interest that all subscribers to Petitioner's have in mitigating litigation risk from patents in those zones.").

Final decisions have found that Unified's status as the sole RPI was not in question because "Petitioner's members join particular zones [and] Petitioner files IPRs on behalf of those zones[.]"

- See, e.g., *Unified Patents Inc. v. Fall Line Patents, LLC*, IPR2018-00043 (<https://portal.unifiedpatents.com/ptab/case/IPR2018-00043>), Paper 34 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2018-00043%2F34>) at 11-20 (PTAB April 4, 2019).

Institution decisions have held that evidence consisting solely of generic statements from Unified's web page that generally describe its business was insufficient to demonstrate that the petition failed to name all RPIs.

- See, e.g., *Unified Patents Inc. v. Mobility Workx, LLC*, IPR2018-01150 (<https://portal.unifiedpatents.com/ptab/case/IPR2018-01150>), Paper 9 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2018-01150%2F9>) at 4 (PTAB Dec. 3, 2018).

Institution decisions have rejected Patent Owner's arguments that all members of Unified's Content Zone are RPIs, explaining that "there is no evidence that any of Petitioner's members controlled, directed, or directly financed this proceeding."

- See, e.g., *Unified Patents Inc. v. Realtime Adaptive Streaming, LLC*, IPR2018-00883 (<https://portal.unifiedpatents.com/ptab/case/IPR2018-00883>), Paper 36 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2018-00883%2F36>) at 16-17 (PTAB Nov. 27, 2018) (further noting that there was 1) no communication between Unified and any member regarding the petition or underlying litigation involving the patent; 2) no corporate relationships between Unified and members other than the membership agreement; 3) no evidence of a "very significant payment" shortly before Unified filed its IPR; and 4) no evidence that any member desired review of the patent but was time-barred from doing so.).[1]

Final decisions have held that "the evidence shows that Petitioner makes all decisions regarding any inter partes review proceeding, including which patents to challenge, without input from its members, and that Petitioner alone bears all costs of any such proceeding."

- See, e.g., *Unified Patents Inc. v. Plectrum LLC*.

IPR2017-01430

(<https://portal.unifiedpatents.com/ptab/case/IPR2017-01430>), Paper 30 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2017-01430%2F30>) at 9-10 (PTAB Nov. 13, 2018); *id.*, Paper 8 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2017-01430%2F8>) (PTAB Nov. 14, 2017) (institution decision holding that “[t]he mere fact that members provide payment to Petitioner for a subscription to Petitioner’s services alone is insufficient to show that these members are funding this particular inter partes review.”).

And Board decisions have routinely held that Unified’s RPI status need not be addressed, at least because under *Sharkninja*, neither the time bar nor the estoppel provisions of 35 U.S.C. § 315 were implicated.

- See, e.g., *Unified Patents, LLC v. Fat Statz, LLC*, IPR2020-01665 (<https://portal.unifiedpatents.com/ptab/case/IPR2020-01665>), Paper 51 (PTAB Apr. 4, 2022) (final written decision, finding no explanation how a member benefits from Unified’s proceeding when parallel litigation on the same patent had already settled); *id.*, Paper 19 (<https://portal.unifiedpatents.com/ptab/case/IPR2020-01665>) (PTAB April 16, 2021) (institution); *Unified Patents, LLC v. MemoryWeb, LLC*, IPR2021-01413 (<https://portal.unifiedpatents.com/ptab/case/IPR2021-01413>), Paper 15 (PTAB Mar. 14, 2022) (institution); *Unified Patents, LLC v. Engle Grange, LLC*, IPR2020-01334 (<https://portal.unifiedpatents.com/ptab/case/IPR2020-01334>), Paper 37 (PTAB Jan. 19, 2022) (final written decision); *Unified Patents, LLC v. Voice Tech Corporation*, IPR2020-01018 (<https://portal.unifiedpatents.com/ptab/case/IPR2020-01018>), Paper 46 (PTAB Dec. 13, 2021) (final written decision, finding “the facts in [A/T] are

clearly distinguishable from the facts in this case”); *Unified Patents, LLC v. ETRI*, IPR2020-01048 (<https://portal.unifiedpatents.com/ptab/case/IPR2020-01048>), Paper 57 (PTAB Dec. 3, 2021) (final written decision, finding *Sharkninja* does not “require the Board” to perform a full RPI analysis absent an implicated bar or estoppel); *Unified Patents, LLC v. Velos Media, LLC*, IPR2020-00352 (<https://portal.unifiedpatents.com/ptab/case/IPR2020-00352>), Paper 39 (PTAB June 28, 2021) (final written decision); *Unified Patents, LLC v. Arsus, LLC*, IPR2020-00948 (<https://portal.unifiedpatents.com/ptab/case/IPR2020-00948>), Paper 15 (PTAB Dec. 4, 2020) (institution).

Pre-AIT Decisions

The Board has held that Unified’s revenue coming from annual membership subscription fees does not make members RPIs even if timing of some of those funds was used to argue that the funds could have been used to file the IPR. “The evidence does not show an obligation on Unified’s part to file inter partes review proceedings on behalf of any member in return for payment, nor does it show that Unified’s members have any control over when and how Unified spends the revenue received from its members.”

- See, e.g., *Unified Patents Inc. v. MONKEYMedia, Inc.*, IPR2018-00059 (<https://portal.unifiedpatents.com/ptab/case/IPR2018-00059>), Paper 15 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2018-00059%2F15>) (PTAB Apr. 16, 2018).

Final decisions have held that, in view of Petitioner’s identification of itself as the sole RPI, the burden shifted to the patent owner failed to produce sufficient evidence tending to place the RPI issue in dispute. Patent owner produced no evidence and thus never met or shifted the burden.

- See, e.g., *Unified Patents Inc. v. Digital Stream IP*, IPR2016-01749 (<https://portal.unifiedpatents.com/ptab/case/IPR2016-01749>), Paper 22 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2016-01749%2F22>) (PTAB Mar. 9, 2018).

Institution decisions have found that RPI arguments not raising specific evidence of communications or direct funding to challenge any specific patent failed; a “mere possibility” of communications related to the selection of patents would not suffice.

- See, e.g., *Unified Patents Inc. v. Nonend Inventions N.V.*, IPR2016-00174 (<https://portal.unifiedpatents.com/ptab/case/IPR2016-00174>), Paper 10 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2016-00174%2F10>) (PTAB May 12, 2016) (final decision (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2016-00174%2F26>) did not disturb the RPI analysis).

Institution decisions have held that Unified’s members were not RPIs where there was no evidence of funding or control relating to specific IPRs, where Unified only filed IPRs against member-litigated patents.

- See, e.g., *Unified Patents Inc. v. Dragon Intellectual Property, LLC*, IPR2014-01252 (<https://portal.unifiedpatents.com/ptab/case/IPR2014-01252>), Paper 37 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2014-01252%2F37>) (PTAB Feb. 12, 2015) (claims cancelled in a Final Written Decision (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2014-01252%2F64>) issued Feb. 5, 2016).

Institution decisions have distinguished Unified from the *In re Guan* “Trollbusters” *inter partes* reexam decision cited in the PTAB Trial Practice Guide because Unified

cited in the PTAB Trial Practice Guide because Unified members did not “[pick] the patents to be challenged and [provide] funding for the particular proceedings[.]”

- See, e.g., *Unified Patents Inc. v. iMTX Strategic, LLC*, IPR2015-01061 (<https://portal.unifiedpatents.com/ptab/case/IPR2015-01061>), Paper 9 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2015-01061%2F9>) (PTAB Oct. 15, 2015) (final decision (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2015-01061%2F22>) did not disturb the institution decision’s RPI analysis).

Institution decisions have held that the timing of Unified’s filing activities being potentially beneficial to particular members or parties did not make such members RPIs.

- See, e.g., *Unified Patents Inc. v. Hall Data Sync Tech., LLC*, IPR2015-00874 (<https://portal.unifiedpatents.com/ptab/case/IPR2015-00874>), Paper 11 (<https://s3-us-west-1.amazonaws.com/ptab-filings%2FIPR2015-00874%2F11>) (PTAB Sept. 17, 2015) (settled Dec. 21, 2015 (<http://www.unifiedpatents.com/news/2016/6/8/ce21d6xmq1vtjdy1qh2c2izx5f9pes>)).

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