

Post-Grant for Practitioners: Recent Developments in RPI/Privity



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- ◆ How often? ... bi-monthly
- ◆ When? ... 2nd Wednesday
- ◆ Topics? ...
 - Important decisions
 - Developments
 - Practice tips
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 - Questions
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Recent Developments in RPI/Privacy




The Federal Circuit issued two landmark decisions over the past several months that have changed the landscape for determining RPIs and parties in privity to a PTAB petitioner. *Applications in Internet Time, LLC v. RPX Corp.* ("AIT") and *Worlds Inc. v. Bungie, Inc.* ("Worlds") have reinforced the notion that the burden of persuasion remains on the petitioner to prove that it is not in privity with an estopped party and that there are no unnamed RPIs. In *AIT*, the Federal Circuit indicated that the Board must look beyond express assertions made by the petitioner and consider the entirety of the evidentiary record in assessing satisfaction of that burden. In *Worlds*, the Federal Circuit clarified that the burden of persuasion is initially satisfied by petitioner designation of RPI and certification of no estoppel in its petition. However, the petitioner may have to do more to carry its burden if confronted with an evidence-based challenge by the patent owner to its RPI designation. In addition to informing the Board of the proper framework for analyzing the RPI/privacy issue, *AIT* and *Worlds* have also arguably lowered the bar for what types of relationships might lead to a finding of privity.

Join us on Tuesday, December 18, as Fish attorneys [Karl Renner](#), [Rob Devoto](#), and [David Holt](#) explore these new developments and what petitioners and patent owners should know with regard to these thorny issues.

[Register now](#) for this Post-Grant for Practitioners webinar.

Tuesday, December 18, 2018
1:00 – 2:00 PM EST
Via the web

Speakers:

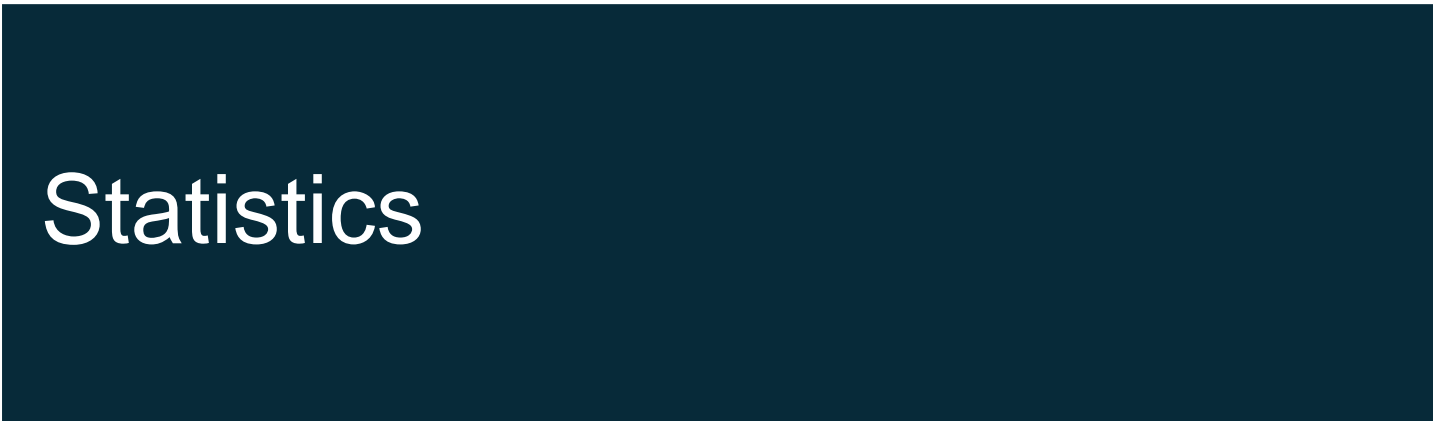
		
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If you have questions, please contact Lauren McGovern at mcgovern@fr.com.

- ◆ Why are the concepts of privity and real party in interest (RPI) important in post-grant proceedings?
- ◆ Appealable? ... *Wi-Fi One En Banc* (Jan 2018)
 - 35 USC 315(b) was found appealable, arguably opening the door for the Federal Circuit to assess the RPI/privity analyses performed by the Board
- ◆ Federal Circuit Ongoing Guidance - Evolution of privity and RPI analysis in the context of IPRs in 2018



Statistics



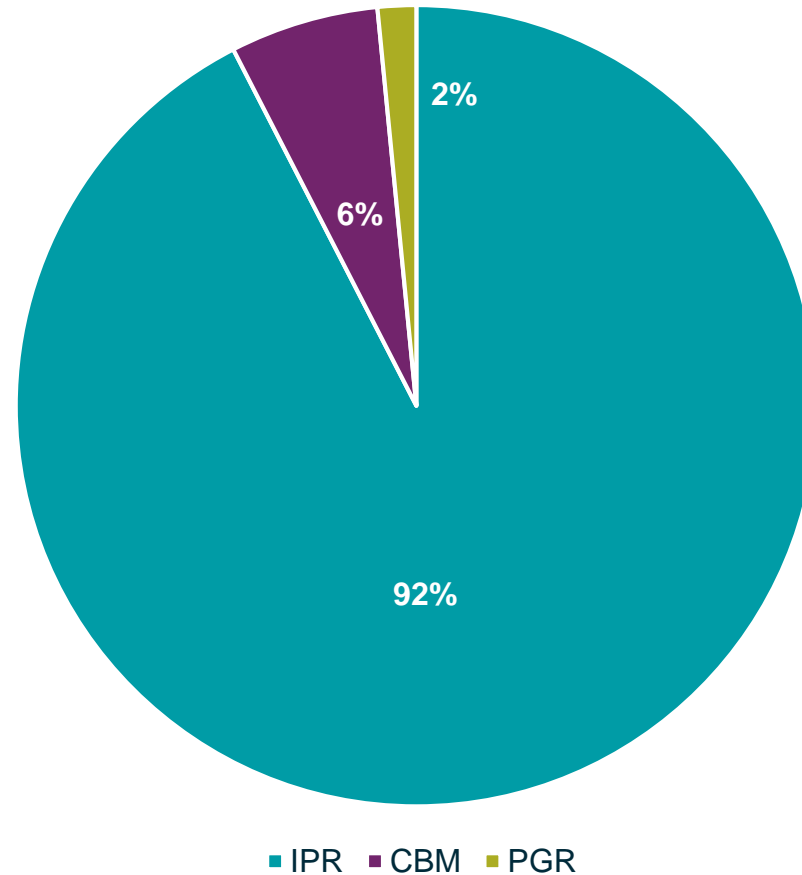
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PTAB – The Most Active Forum

Most active courts by number of cases	2013	2014	2015	2016	2017	2018 YTD
PTAB	792	1,677	1,800	1,758	1,799	1,649
TXED	1,500	1,429	2,551	1,683	868	491
DED	1,335	942	544	457	779	833
CACD	411	320	278	290	339	294

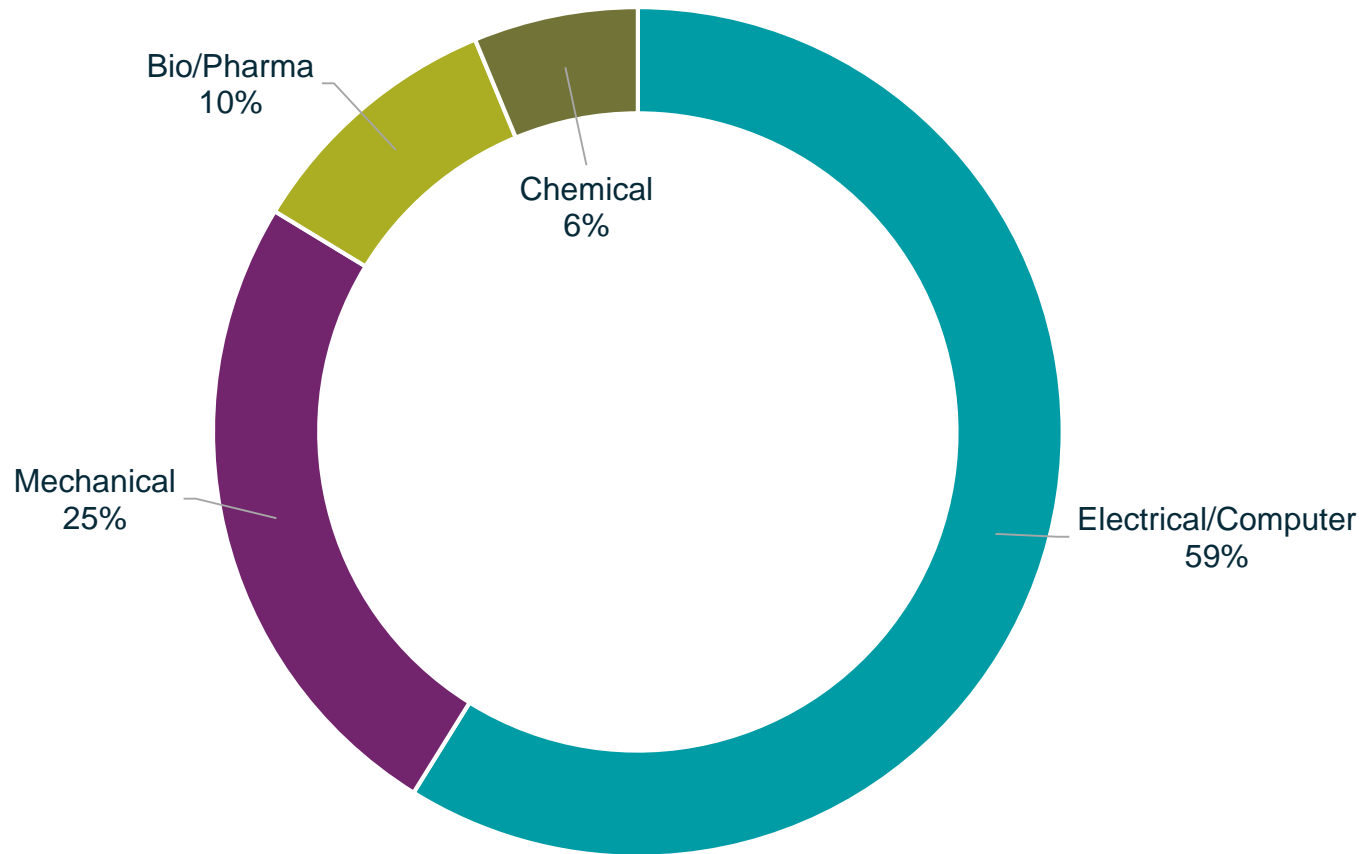
Filings Continue To Exceed Expectations

9,600 AIA Petitions Filed Since 2012



Technology Breakdown By USPTO Tech Center

2012 - Present



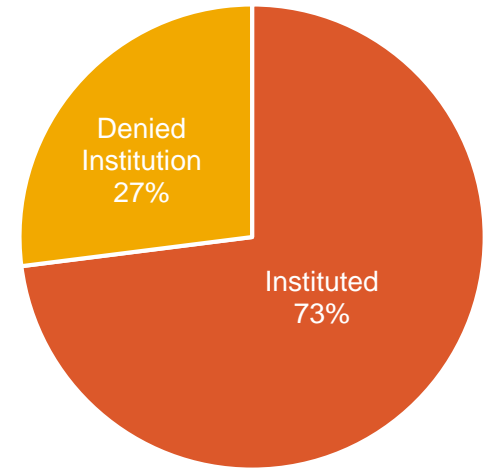
■ Electrical/Computer ■ Mechanical ■ Bio/Pharma ■ Chemical

Source: Lex Machina, as of 12/17/2018, design Patents make up <1% of remaining petitions

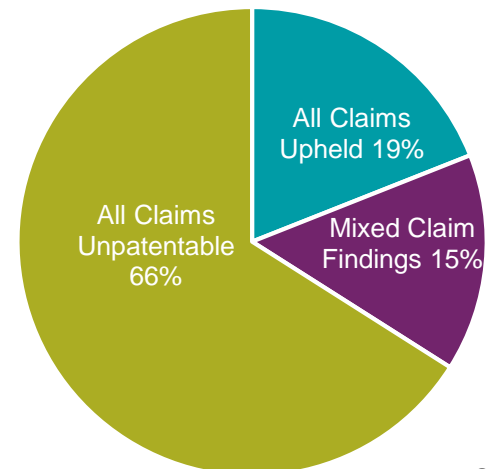
IPR Institution and Final Written Decision

8,859 IPR petitions have been filed at the PTAB

6,135 IPR petitions reached an Institution Decision



2,210 IPR petitions reached a Final Written Decisions



Why Are The Concepts Of Privity
And RPI Important In Post-Grant
Proceedings?


Importance of RPI & Privity In IPRs

- ◆ **RPI & Privity Sections – Sections Placed by Congress “[t]o address the Concern about Patent Owners Being Harassed”**
 - 35 USC 312(a)(2) – Identify all RPIs- Ensures that all parties that attacked the patent are properly identified to allow the monitoring of improper, repeat filings by those entities.
 - 35 USC 315(a)(1) – DJ Bar – Ensures that all parties rely on only one tool, either IPR or DJ action, to attack the validity of the patent.
 - 35 USC 315(b) – One Year Bar – Provides a limited time window for any sued party to attack validity of the patent.
 - 35 USC 315(e)(1) - Estoppel Directed to USPTO Proceedings – Prevents parties from launching a second attack on patent via the USPTO.
 - 35 USC 315(e)(2) - Estoppel Directed to Civil Actions And Other Proceedings – Prevents parties from launching a second attack on patent via non-USPTO forums.

Appealable? ... *Wi-Fi One
En Banc* (Jan 2018)

Enter The Federal Circuit – 315(b) Becomes Appealable

- ◆ ***Wi-Fi One, LLC v. Broadcom Corporation*, 878 F.3d 1364 (Fed Circuit 2018) (“*Wi-Fi One En Banc*”)** – Decided January 8, 2018
 - Overruled *Achates Reference Publishing, Inc. v. Apple Inc.*, 803 F.3d 652, 658 (Fed. Cir. 2015) (“*Achates*”)
 - Recognized a strong presumption in favor of judicial review of agency actions
 - To overcome the presumption, Congress must clearly and convincingly indicate its intent to prohibit judicial review
 - Fed Circuit finds “no clear and convincing indication of such congressional intent”
 - **Time-bar determinations under 35 USC 315(b) are appealable**



Federal Circuit Ongoing Guidance:
Evolution Of Privity And RPI–
Analysis In The Context Of IPRs In
2018

The Four Seminal Fed Circuit Cases On RPI/Privity Of 2018

- ◆ ***Wi-Fi One Remand* - Initial RPI/Privity Guidance**
 - Fed. Cir. provides initial guidance on the RPI and privity inquiries in IPRs
 - Upholds Board decisions.
- ◆ ***WesternGeco* - Further Privity Guidance**
 - Fed. Cir. provides more detailed guidance re privity inquiry in IPRs
 - Upholds Board decisions.
- ◆ ***AIT* - Further RPI Guidance**
 - Fed. Cir. provides more detailed guidance re RPI inquiry in IPRs
 - Vacates and remands Board decisions.
- ◆ ***Worlds* - RPI and Privity Burden Framework**
 - Fed. Cir. explores the burden framework of the RPI and privity inquiry
 - Vacates and remands Board decisions.

Initial RPI/Privity Guidance – Wi-Fi One Remand

◆ Facts –

- **Original law suits** – Wi-Fi’s predecessor, Ericsson, filed law suits against “D-Link defendants” asserting infringement of 9 patents. Jury found infringement of 3 patents.
- **Petitioner Broadcom** - Broadcom, a manufacturer of some of the accused chips, files IPR petitions against the 3 patents shortly after judgement entered.
- **Wi-Fi asserts 315(b) Bar** - Wi-Fi sought to bar Broadcom’s petitions under 315(b) alleging that some or all of the D-Link defendants are RPIs of the IPRs or are in privity with Broadcom.
 - **Motion for additional discovery denied** - Wi-Fi filed a motion to obtain additional discovery, but the Board denied the motion
- **Board holds insufficient evidence** - In both ID and FWD, the Board rejected Wi-Fi’s argument that Broadcom was in privity with any D-Link defendants or that any D-Link defendant was a RPI.
- **Wi-Fi Appeals Board’s 315(b) determination to Fed Circuit (Wi-Fi En Banc)**, which remands case to PTAB

Initial RPI/Privity Guidance – Wi-Fi One Remand

- ◆ **Fed Circuit provides initial guidance on RPI/privity inquiry**
 - **Common law principles govern scope** – Common law terms “privity” and “real party in interest” indicate Congress intended to adopt common law principles to govern the scope of 315(b).
 - **Support for PTO Trial Practice Guide guidance on privity inquiry** – “Flexible” analysis for determining whether the relationship between two parties is “sufficiently close such that both should be bound by the trial outcome and related estoppels”
 - **Support for PTO Trial Practice Guide guidance on RPI inquiry**
 - Whether some party other than the petitioner is the “party or parties at whose behest the petition has been filed.” “[A] party that funds and directs and controls an IPR... proceeding constitutes a ‘real party-in-interest,’ even if that party is not a ‘privity’ of the petitioner.”

Initial RPI/Privity Guidance – Wi-Fi One Remand

- ◆ **Fed Circuit upholds Board’s denial of Wi-Fi One’s motion for additional discovery**

- In support of its motion for additional discovery, Wi-Fi One offered evidence to support RPI/privity allegations and motion for additional discovery, including prior indemnification and communications between the parties.
- **Burden is on Wi-Fi One** to show that “interests of justice standard” is met to obtain “additional discovery”
- **Burden is not met** because Wi-Fi One’s evidence fails to show that there exists “more than a possibility” or “mere allegation” that something useful will be found.
- **Board’s focus on control and opportunity of control of related litigation was proper**

Initial RPI/Privity Guidance – Wi-Fi One Remand

- ◆ **Fed Circuit upholds Board’s decision as supported by substantial evidence**
 - **No RPIs** – Broadcom had its own interest and there was no evidence Broadcom was acting at the behest or on behalf of D-Link defendants
 - **No privity** – Evidence failed to show Broadcom had sufficient control over the district court litigation to justify treating Broadcom as a virtual party to that proceeding

Initial RPI/Privity Guidance – Wi-Fi One Remand

◆ Notable Observations

- **Burden placed on Wi-Fi One for motion for additional discovery** – Wi-Fi failed to satisfy the heavy “interests of justice” burden to obtain such discovery.
- **But no mention of burden regarding RPI/privity inquiry** – Fed Circuit did not mention the burden regarding the RPI/privity inquiry. Should it have?
- **To be revisited later: Tension between Wi-Fi One Remand and Worlds?** – Is there a tension between Wi-Fi One Remand and the burden framework advanced in Worlds? We will consider this in more detail later.

Further Privity Guidance – WesternGeco

◆ **Facts –**

- **PGS files IPR petitions after ION’s 1 year service date** – In response to lawsuit, PGS files IPR petitions against patents, obtaining institution against 3 of the 4 patents.
- **ION joins PGS IPR petitions** – Both PGS and WesternGeco oppose joinder, but Board grants ION’s request to join, restricting ION’s role to “spectator” status.
- **WesternGeco’s time-bar argument** – WesternGeco argues PGS’s petitions should be time-barred under 35 USC 315(b), alleging privity and RPI but focusing on privity
- **Board issues FWDs against WesternGeco** – Board issues FWD rejecting time-bar argument and finding all instituted claims to be anticipated or obvious.
- **WesternGeco Appeals FWDs** – WesternGeco appeals Board’s time-bar and unpatentability determinations.

Further Privity Guidance – WesternGeco, cont.

- ◆ **Fed Circuit provides further guidance on privity inquiry**
 - **Again supports privity analysis in PTO Trial Practice Guide** – Affirms that privity “is a highly fact dependent question,” and requires the Board to engage in a “flexible” analysis on a “case-by-case” basis.
 - **The standards for the privity inquiry must be grounded in due process** – Reach of privity cannot result in a due process violation. Did petitioner have a full and fair opportunity to litigate the validity of the patent in the prior lawsuit? Is petitioner simply a proxy to re-litigating patent validity question?
 - **Affirmatively cites to *Taylor* factors** – Six-factor, non-exhaustive framework provided by the Supreme Court in *Taylor v. Sturgell* cited as useful to guide the privity inquiry

Further Privity Guidance – WesternGeco, cont.

- ◆ **Non-Exhaustive *Taylor* Factors Established by Supreme Court for Nonparty Preclusion**
 - (1) **An agreement to be bound.**
 - (2) **Pre-existing substantive legal relationship between the person to be bound and a party to the judgment** – Examples include preceding and succeeding owners of property.
 - (3) **Adequate representation by someone with the same interests who was a party** – Examples include class actions and suits brought by trustees and other fiduciaries.
 - (4) **Assumption of control over the litigation in which the judgment was rendered**
 - (5) **Where the nonparty to an earlier litigation acts as a proxy for the named party to relitigate the same issues**
 - (6) **A special statutory scheme expressly foreclosing successive litigation by non-litigants** – Examples include bankruptcy and probate proceedings.

Further Privity Guidance – WesternGeco, cont.

- ◆ **WesternGeco evidence of alleged privity relationship**
 - Pre-existing customer-manufacturer relationship between PGS and ION
 - Legal relationship as a result of a purchase agreement with indemnity provisions
 - Communications between ION and PGS
- ◆ **Federal Circuit holds no privity**
 - Substantial evidence supports the Board’s finding that ION did not direct, fund, control or influence PGS’s IPR petitions and did not use PGS as a proxy
 - Federal Circuit holds that substantial evidence further supports the Board’s finding that no privity relationship exists based on other factors unrelated to control

Further Privity Guidance – WesternGeco, cont.

◆ Notable observations

- Impact of post-institution behavior on privity
- Common desire among multiple parties to invalidate a patent, alone, insufficient to establish privity
- Standard customer-manufacturer relationship, alone, insufficient to establish privity
- Indemnification agreement with indemnity provisions may not establish privity- No mention of who had burden with respect to RPI/privity inquiry
- To be revisited later – Tension between *WesternGeco* and *AIT*?

Further RPI Guidance – AIT

◆ **Facts –**

- **Original Salesforce litigation** – AIT filed a complaint against Salesforce alleging infringement of two patents.
- **Salesforce filed CBM petitions instead of IPR petitions**
- **Salesforce’s CBM petitions denied institution** for failure to establish that the patents are “covered business method patent[s]”
- **After Salesforce’s 1 year service date, RPX filed IPR petitions challenging the two patents**
- **AIT alleged that the petitions were time-barred because RPX was acting as a proxy for Salesforce, which was an unnamed RPI**

Further RPI Guidance – AIT, cont.

◆ **Facts, cont. –**

- **AIT filed opposed motions for additional discovery, which the Board granted in part** – RPX produced various documents in response to the motions, which AIT leveraged in advancing its RPI arguments in its responses.
- **In the FWDs, the Board rejected AIT’s RPI arguments and a privy argument advanced for the first time by AIT at the oral hearing** – In rendering its decisions, the Board indicated that AIT “ha[d] not provided persuasive evidence to support” its assertion that “RPX must have filed the [petitions] as a proxy for Salesforce” or that its “business model is built upon [RPX] acting as an agent or proxy for third parties in cases just like this.”
- **AIT appealed**

Further RPI Guidance – AIT, cont.

- ◆ **Fed Circuit provides further guidance on RPI inquiry**
 - **Identifies Federal Rule of Civil Procedure 17(a) as codifying the broad, common law principle of “Real Party in Interest”**
 - **Applying FRCP 17(a): “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”**
 - **Acknowledges the “fact-dependent” nature of this inquiry and affirms the Trial Practice Guide’s understanding that this inquiry involves two questions: (1) whether a non-party ‘desires review of the patent’; and (2) whether a petition has been filed at a non-party’s ‘behest.’**
 - **Further affirms the Trial Practice Guide’s statement that “multiple factors [are] relevant to the question whether a non-party may be recognized as” an RPI**

Further RPI Guidance – AIT, cont.

- ◆ **Fed Circuit provides further guidance on RPI inquiry, cont.**
 - Cites favorably to the decision in *Cisco v. HP* (IPR2017-01933), which considered the several factors in performing the RPI inquiry
 - Evidence of “control or funding” is not necessary to be deemed an RPI when evidence otherwise shows a proxy relationship
 - Legal theories described in *Wright & Miller* and other treatises should be considered, including – Party serving as an agent and “Preclusion by apparent authority or estoppel by conduct”
 - It is incorrect to focus an RPI inquiry exclusively on the independent reason petitioner had for filing an IPR - Rather the inquiry should consider whether the unnamed party has an interest and whether petitioner can be said to be representing that interest after examining its relationship with the unnamed party.
 - Judge Reyna’s concurring opinion – *Taylor Framework* also applies to RPI inquiry - While not expressly stated in the majority opinion, Judge Reyna affirmatively states that the *Taylor* framework used for the privity inquiry applies equally to the RPI inquiry.

Further RPI Guidance – AIT, cont.

- ◆ **Evidence of record regarding Salesforce being an unnamed RPI**
 - **Webpages that describe RPX’s business as representing its client’s interests in connection with patent disputes**
 - **RPX’s 10-k annual report lists that one of RPX’s strategies is “facilitate[ng] challenges to patent validity...”**
 - **Salesforce subscribes to RPX’s “patent risk solutions” services – paid substantial sums in membership fees, including substantial sums in membership fees since its membership began and “a very significant payment shortly before the IPR petitions at issue here were filed”**
 - **RPX and Salesforce share a member on their respective boards of directors**
 - **“Best Practices Guide” document – Discloses practices “to ensure that RPX is and will be deemed by the PTAB and district courts as the sole real party in interest in all validity challenges unless another real party-in-interest is expressly identified” (emphasis added).**
 - **Declaration From RPX’s Vice President of Client Relations – RPX followed its guidelines and had independent reasons to file, but reveals communications with Salesforce**

Further RPI Guidance – AIT, cont.

- ◆ **Federal Circuit vacated Board’s decisions as failing to be supported by substantial evidence and remanded for further proceedings**
 - **Overly narrow understanding of “real party in interest” term** - Board’s decisions relied on an impermissibly narrow understanding of the common law meaning of the RPI term.
 - **Failure to consider the entirety of the record** - Board’s decisions were not based on consideration of the entirety of the administrative record.
 - **Misallocation of the burden of proof** - Board’s decisions seemingly misallocated the burden of proof.

Further RPI Guidance – AIT, cont.

- ◆ **On remand, the Federal Circuit encourages the Board to authorize additional discovery**
 - **Majority opinion encourages Board to authorize additional discovery in view of RPX’s “some-what bald assertions”**
 - **Judge Reyna’s concurring opinion goes further-** asserting that the Board should also consider new motions for additional discovery to thoroughly review whether *privity* exists, including application of all of the *Taylor* factors.” Judge Reyna notes that “the 315(b) time bar inquiry is broader than the real party in interest inquiry.”
 - **Is the Federal Circuit lowering the bar for additional discovery when specifically directed to the RPI/privity issue?**

Further RPI Guidance – AIT, cont.

◆ **Notable observations**

- RPI inquiry extends beyond whether a nonparty “funds and directs and controls” an IPR petition
- Evidence can show a non-party to be an RPI due to a proxy relationship without “funding”, “control” or express or implied agreement to pursue the IPRs
- Important to consider interests of non-party
- Is AIT In tension with WesternGeco?
- Fed Circuit expressly acknowledges that burden of persuasion to prove accuracy of RPI/privity designation is on petitioner

RPI and Privity Burden Framework – Worlds

◆ **Facts –**

- **Original law suits** – Worlds asserted five patents against Activision Publishing, Inc. (“Activision”) and other related entities.
- **Petitioner Bungie** - Bungie, a developer of a video game that is published and distributed by Activision, files IPR petitions against the five patents shortly after Activision’s 1 year service date.
- **Worlds asserts 315(b) Bar** – World’s sought to bar Bungie’s petitions under 315(b) alleging that Activision was an RPI of the IPRs. Related motion for additional discovery denied
- **Board holds insufficient evidence** – “Patent Owner has not demonstrated that Activision is an unnamed real party in interest in this proceeding.”
- **Worlds Appeals Board’s 315(b) determination to Fed Circuit**

RPI and Privity Burden Framework – Worlds, cont.

- ◆ **Worlds filed a motion for additional discovery** – Six specific requests for production, including payment information for legal reviews and product development and communications related to legal reviews and indemnification
- ◆ **Evidence offered by Worlds to support RPI allegations and motion for additional discovery** – Software Publishing and Development Agreement (DevPub Agreement) and letter indicating Worlds’s intent to add Bungie’s video game to the list of accused products
- ◆ **Asserts “legal reviews” in DevPub Agreement give Activision an opportunity to control the IPRs** - Worlds argued that the IPRs are “legal reviews” necessary to clear intellectual property rights, and that Activision had the opportunity to control the IPRs, making Activision an RPI.

RPI and Privity Burden Framework – Worlds, cont.

- ◆ **Board denied Worlds’s motion for additional discovery**
 - **Burden is on Worlds** – Burden is on Worlds to show that “interests of justice standard” is met to obtain “additional discovery”
 - **Burden is not met** – Worlds’s evidence and arguments fail to show that there exists “more than a possibility” or “mere allegation” that something useful will be found.

- ◆ **Board’s Final Written Decisions concluded that “Patent Owner has not demonstrated that Activision is an unnamed real party in interest in this proceeding”**
 - **Rejected Worlds’s arguments using the same reasoning as used in their denial of the motions for additional discovery**
 - **Relied on attorney statements made in Bungie’s oppositions to the motions for additional discovery**

RPI and Privity Burden Framework – Worlds, cont.

- ◆ **Federal Circuit begins by analyzing the burden framework traditionally used by the Board to perform the RPI analysis**
 - **Board applied burden framework articulated in *Atlanta Gas Light Co. v. Bennet Regulator Guards* (IPR2013-00453):**
 - Initial identification acts as “a rebuttable presumption”
 - But this does not shift the burden of persuasion, which remains with Petitioner

RPI and Privity Burden Framework – Worlds, cont.

- ◆ **Federal Circuit AGREES** that the petitioner bears the burden of persuasion and that the petitioner’s initial identification of RPIs should be accepted unless and until disputed by patent owner
- ◆ **But Fed Circuit DISAGREES** that the petitioner’s initial identification should act as “a rebuttable presumption” shifting a burden of production to the Patent Owner
 - Acceptance of initial identification is “practical”, not presumption
 - To raise the RPI issue, Patent Owner must produce “some evidence that tends to show that a particular third party should be named a real party in interest” (emphasis added)

RPI and Privity Burden Framework – Worlds, cont.

- ◆ **The Federal Circuit then applies the corrected burden framework to the Board’s decisions**
 - **Board was correct in initially accepting Bungie’s designation of RPIs.**
 - **BUT Worlds presented evidence sufficient to put Bungie’s designation “into dispute”** – Fed Circuit concludes that the evidence provided by Worlds was sufficient to satisfy the “some evidence” requirement.
 - **Board, at that point, was required to assess whether Bungie satisfied its burden of persuasion with respect to the RPI Inquiry, but it failed to do so**

RPI and Privity Burden Framework – Worlds, cont.

- ◆ **The Federal Circuit vacates the FWDs and remands the cases back to the Board for further consideration**
 - **Board instructed to apply proper framework** – Board should weigh evidence in a manner that places the ultimate burden of persuasion on Bungie, the petitioner.
 - **Board encouraged to consider additional discovery** – Fed Circuit states “in light of this court’s recent guidance on the substantive real-party-in-interest inquiry [citing AIT], the Board, in its discretion, should consider whether to allow for additional discovery on this issue.”

RPI and Privity Burden Framework – Worlds, cont.

◆ **Notable observations**

- **Framework seems equally applicable to privity inquiry**
- **Easier for Patent Owner to attack petitions based on improper designation of RPIs and privies**
- **How will “some evidence” requirement be applied?**

RPI and Privity Burden Framework – Worlds, cont.

- ◆ **Is there a tension between Worlds and Wi-Fi One Remand?**
 - Is “some evidence” requirement satisfied?
 - Did Fed Circuit misplace the burden of persuasion in Wi-Fi One Remand?
 - Upholds Board’s ruling that “Wi-Fi [i.e., the Patent Owner] had not shown that Broadcom was in privity with the D-Link defendants or that any of the D-Link defendants was a [RPI]” emphases added.
 - Focuses on deficiencies in Wi-Fi One’s (i.e., the Patent Owner’s) evidence
 - Did not cite to affirmative evidence of lack of control by Broadcom of related litigation



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Post-Grant for Practitioners Webinar Series

SAVE THE DATE

2018 Post-Grant Year in Review Webinar

Wednesday, January 9, 1-2PM ET

**Speakers: Post-Grant Practice Co-Chairs
Dorothy Whelan & Karl Renner**

Thank You!

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