



THINK FORWARD

Bringing Real Parties of Interest to Light: Applications in Internet Time, LLC v. RPX Corporation

By [Michael Hussey](#), [Peter Lee](#)

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A petition for *inter partes* review (IPR) must identify all real parties in interest. In addition, the petition must be filed within one year of the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent. In *Applications in Internet Time, LLC v. RPX Corp.*, Case Nos. 17-1698, -1699, -1701 (Fed. Cir. July 9, 2018), the Federal Circuit instructed the Patent Trial and Appeal Board (PTAB) to use a new, broader test to determine who is a real party in interest. This test is important to any IPR petitioner because if all real parties in interest are not properly identified in the IPR petition, then it may be too late to subsequently file a new petition within one year of being served a complaint.

According to Section § 312(a)(2) of the Leahy-Smith America Invents Act, an IPR petition will only be considered when it identifies all real parties in interest. Prior to *Applications in Internet Time*, patent defense groups such as RPX Corporation have been known to file IPRs without naming their member companies as real parties of interest on their petitions. In such arrangements, where a petitioner company is created for the purpose of filing IPRs for the protection of member companies, the PTAB has found that a member company is not a real party in interest unless direct funding and/or control over the IPR proceedings can be shown. See e.g., *Unified Patents v. Dragon Intellectual Property*, IPR2014-01252, Paper No. 37 at page 12 (Decision Institution of IPR).

In *Applications in Internet Time*, RPX filed IPR petitions challenging AIT's patents more than one year after one of RPX's member companies, Salesforce, was served complaints asserting patent infringement of AIT's patents. RPX did not identify Salesforce as a real party in interest in the IPR petitions. AIT objected to these IPR petitions, alleging Salesforce was a real party in interest and, therefore, the IPR petitions filed by RPX were time barred. The PTAB took this issue under consideration, but ultimately found Salesforce not to be a real party in interest, and eventually invalidated certain claims of AIT's patents.

On appeal, the Federal Circuit concluded that the PTAB applied an "unduly restrictive test for determining whether a person or entity is a 'real party in interest' within the meaning of § 315(b) and failed to consider the entirety of the evidentiary record." In terms of determining a real party in interest, the Federal Circuit emphasized taking a fact-based approach and looking for a "clear beneficiary that has a preexisting, established relationship with the petitioner":

Determining 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.

Going forward, petitioners will want to consider the Federal Circuit's new guidance from *Applications in Internet Time* when deciding who to identify as a real party in interest on their petitions. Conversely, patent owners may consider raising arguments relating to a failure to identify real parties of interest. On September 9, 2018, RPX petitioned the Federal Circuit for a rehearing *en banc*, so there may be further developments in the near future.

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If you have any questions or wish to discuss how this decision impacts your business, please contact one of our [Brinks Attorneys](#).