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Director Restores Strict RPI Requirement for IPRs

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In a memorandum issued on October 28th, Director Squires designated *Corning Optical Communications RF, LLC v. PPC Broadband Inc.* (IPR2014-00440) as precedential to restore the requirement for petitioners in *inter partes* review (IPR) proceedings to identify all real parties in interest (RPIs) before a trial is instituted. This action effectively overrules the prior, more permissive practice established by the now-de-designated decision in *SharkNinja Operating LLC v. iRobot Corp.* (IPR2020-00734). The *SharkNinja* decision held that where the RPI analysis would not make any material difference, not engaging in the RPI analysis better served the interest of cost and efficiency. The memorandum reinstates the USPTO's pre-*SharkNinja* practice of requiring petitioners for IPR to identify all RPIs before a trial is instituted.

The *Corning* decision found that determining a RPI is a highly fact-dependent question with "no bright line test," but the inquiry typically focuses on whether the non-named party funded, directed, controlled, or could have exercised control over the IPR proceeding. The PTAB granted the PO's motion to dismiss the IPR petition and terminate the proceeding because the Petitioner (Corning Optical Communications RF, LLC) failed to identify its parent company, Corning Incorporated, and its sister company, Corning Optical Communications LLC—the Board found that these related entities should have been named as RPIs because they funded and/or controlled the filing and conduct of the IPR. The decision also confirmed that a failure to name all RPIs is a statutory prerequisite that leads to dismissal, and in some cases, re-filing an IPR petition will be barred under the one-year rule.

While the memo acknowledges the policy concerns in *SharkNinja* about difficulties for determining RPIs, it argues that policy justifications alone do not provide adequate reason to ignore the best reading of the statute. The memo also highlights countervailing policy considerations, particularly those related to national security. The memo explicitly addresses concerns regarding exploitation by foreign state-backed actors including the increasing number of petitions filed by entities on the Department of Commerce "entity list" (parties "involved in activities that are contrary to the national security or foreign policy interests of the United States") since *SharkNinja* was decided.

Going forward, the PTAB will strictly enforce the statutory mandate under 35 U.S.C. § 312(a)(2), which requires a petitioner to "identif[y] all real parties in interest", with additional scrutiny on foreign actors identified or sanctioned by the Office of Foreign Assets Control (OFAC) or the U.S. Trade Representative (USTR).

- Impact on Petitioners: Petitioners must conduct thorough due diligence and anticipate and address any potential challenge regarding RPI identification before institution. Failure to properly disclose all RPIs will be grounds for denying institution and can result in potential statutory bar issues for re-filing a petition. The standard for disclosure is now higher, and the consequence of failure to identify all RPIs is the loss of your right to proceed with the IPR.
- Impact on Patent Owners: This restoration to pre-*SharkNinja* practice provides Patent Owners with a powerful, renewed tool to challenge petitions on procedural grounds by questioning the completeness and accuracy of the petitioner's RPI disclosure. The *Corning Optical* precedent may be used to aggressively challenge the RPI disclosure in any new or existing IPR petition.