

PTAB Says VMWare Too Late With Patent Review Petition

By **Ryan Davis**

Law360, New York (March 09, 2015, 4:44 PM ET) -- The Patent Trial and Appeal Board on Friday refused to review three Good Technology Corp. patents, ruling that the petitions by rival VMWare Inc. were filed too late because a company VMWare recently acquired was sued over the patents two years ago.

The case hinges on the American Invents Act provision that requires inter partes reviews to be filed within one year of when the petitioner, or a company it has a relationship with, was sued for infringement. The board held that determining whether a relationship exists between the parties can involve events after the complaint was filed.

In the case, Good sued AirWatch LLC over the patents in 2012 and VMWare acquired AirWatch for \$1.5 billion in February 2014. VMWare filed inter partes review petitions challenging the validity of Good's patents in October 2014.

VMWare acknowledged that as a result of the acquisition it now has a relationship with AirWatch, also referred to as privity. However, it argued that its petition was not time-barred because the two companies had no relationship at the time Good filed its complaint.

The PTAB disagreed, ruling that "we do not conclude that privity ... is determined only at the time of service of a complaint alleging infringement of the challenged patent."

"At least some of the factors analyzed in determining whether a party is a real party in interest or a privity of the petitioner involve actions or events that may occur after service of a complaint alleging infringement of the challenged patent," it said.

It held that because AirWatch, which now has a relationship with VMWare, was sued by Good over a year before the petition was filed, VMWare's petitions are untimely.

Steven Pollinger of McKool Smith PC, an attorney for Good, said Monday that the decisions are important because some earlier PTAB decisions had suggested that the relationship between the parties at the time the complaint was filed is the only relevant question.

The rulings makes clear that "there is no hard and fast rule that privity only matters at the time of the complaint," he said, and that similar questions in the future will be decided case by case.

Good and VMWare's AirWatch are rivals in the market for enterprise-mobile management technology,

which allows companies to securely manage their data when employees access it on smartphones and other mobile devices.

In addition to Good's suit against AirWatch, which remains pending in the Northern District of California and is set for trial in June, the two companies are embroiled in patent suits against each other in the Northern District of Georgia, Germany and the United Kingdom.

An attorney for VMWare could not immediately be reached for comment Monday.

The patents at issue are U.S. Patent Numbers 8,012,219; 6,151,606; and 7,970,386.

Good Technology is represented by Steven Pollinger of McKool Smith PC and Phillip Bennett of EIP US LLP.

VMWare is represented by Matthew Kreeger, Diek Van Nort and Fahd Patel of Morrison & Foerster LLP.

The cases are VMWare Inc. v. Good Technology Software Inc., case numbers IPR2015-00027, IPR2015-00030 and IPR2015-00031, before the Patent Trial and Appeal Board.

The underlying case is Good Technology Corp. v. AirWatch LLC, case number 5:12-cv-05827, in the U.S. District Court for the Northern District of California.

--Editing by Brian Baresch.