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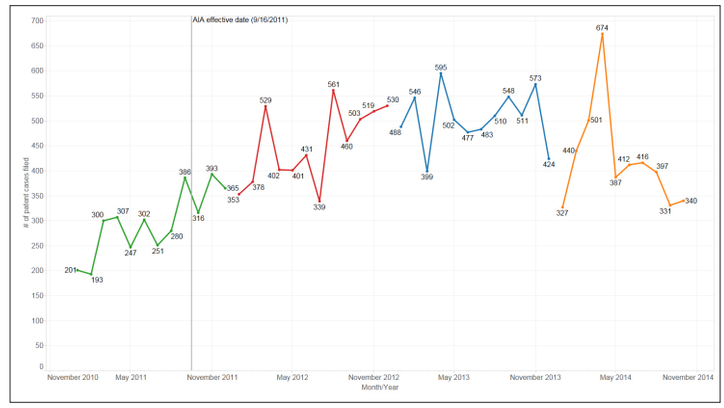
COVER STORY

Patent suit drop has lawyers mulling future

Alexander Drecun / Special to the Daily Journal

John B. Sganga Jr., chair of litigation at Knobbe, Martens, Olson & Bear LLP, says district judges have relied on the Supreme Court's Alice decision to strike down overly broad software patents.



By Kevin Lee / Daily Journal Staff Writer

Patent litigation across the nation has seen a downturn that may portend long-term changes for attorneys and law firms whose practices benefited from its rapid growth. The number of new patent lawsuits filed through the first 10 months of this year has dropped 16 percent compared to the same period last year, according to data collected from Lex Machina, a Menlo Park-based legal data analytics company.

The decline is more dramatic in the four months since a U.S. Supreme Court decision issued in mid-June that legal observers say may be driving the decline. The high court determined that abstract ideas grounded in "generic computer implementation" are ineligible for patent protection. *Alice Corporation Pty. Ltd. v. CLS Bank International et al*, 134 S. Ct. 2347.

New patent complaints filed from July to October fell 27 percent compared to the same four-month period in 2013, according to The Lex Machina data.

Patent lawsuits filed last month dropped a third.

While last year represented a record year in patent litigation, the Lex Machina data shows that lawsuits for this year are on pace to drop below 2012 figures.

"The smaller number of cases that are being filed now does reflect the overall climate of patent assertion in the U.S.," said James C. Otteson, founder of Menlo Park-based litigation boutique Agility IP Law LLP who has filed numerous infringement cases on behalf of Cupertino-based Technology Properties Limited LLC and San Jose-based Maxim Integrated Products Inc.

"It's just not a very favorable landscape for patent assertion," he said.

It is uncertain whether the drop in litigation activity will be a permanent trend, but patent litigators are beginning to ask themselves how their practices will look, both in the short- and long-term.

"Courts and clients and society would all probably benefit from fewer patent lawsuits," said Mark A. Lemley, professor at Stanford Law School and a partner at San Francisco-based litigation firm Durie Tangri LLP. "Patent litigators might not be a group that benefits."

Lemley co-founded Lex Machina.

Experts say the drop in litigation could be attributed to a combination of factors, including several rulings from the Supreme Court this year and the growing popularity of administrative procedures to challenge patents at the U.S. Patent and Trademark Office.

These changes have shifted some of the burden and financial costs of lawsuits toward patent holders and away from accused infringers.

John B. Sganga Jr., the litigation practice chair at Knobbe, Martens, Olson & Bear LLP, said district judges have relied on the Supreme Court's *Alice* decision to strike down overly broad software patents and conclude lawsuits at very early stages.

"This is a huge shift. Defendants don't have to wait until after discovery or after a Markman (claim construction) hearing. It's far less expensive to win a case," said Sganga, who works out of the firm's Irvine headquarters. "The really broad patent claims that people were happy with a decade ago are coming back to bite them."

Sganga said that the *Alice* decision prompts patent holders to rethink whether to initiate litigation at all, given the risk of a judge invalidating the patent.

John A. Dragseth, a Minneapolis-based Fish & Richardson PC principal, said patent litigation is no longer as simple as squaring off in a courtroom.

He pointed out that the patent review procedures implemented through the America Invents Act, a 2011 patent reform law, were intended primarily to improve patent quality post-prosecution, but they have become a lynchpin in the defense of an accused infringer.

"Change is the big point to understand here. We are moving from an area where you had [patent] prosecution and litigation to a world where those lines are blurred and you have proceedings in the patent office that look a lot like litigation," Dragseth said.

"You can't keep those practices in silos anymore," he added. "You can't keep in-house prosecution and litigation teams separate."

Some experienced patent litigators have jumped onto the patent trial bandwagon. Over the first ten months of this year, the patent office's Patent Trial and Appeal Board has received 1,359 patent review petitions, more than double the 574 petitions received for the same period last year.

But Lemley said revenues earned from invalidity proceedings, which include inter partes and covered business method reviews, could not completely replace litigation work for practitioners or firms.

"We've seen [inter partes review] and [covered business method review] are definitely a growth area and I think firms are going to be investing in more and more of that," Lemley said.

"But it's a lot cheaper to file an [inter partes review] than it is to litigate a case, so I'm not sure that's going to be a viable economic substitute," he added.

Ashok Ramani, a San Francisco-based Keker & Van Nest LLP partner, said the *Alice* decision and the popularity of patent office proceedings would likely continue to depress certain lawsuits pursued by non-practicing patent holders that seek nuisance fee settlements.

"There's a pretty clear expectation that certain types of cases brought by certain types of patent holders are in a period of decline," Ramani said. "There is a question of whether cases between competitors and larger, very well-funded [non-practicing entities] are going to be affected and I think that remains to be seen."

Sganga remained bullish about the prospects for the patent litigation practice. He pointed out that Knobbe Martens secured a $466 million jury verdict last month in Delaware for Irvine-based health technology company Masimo Corp. against Philips Electronics North America Corp. *Masimo Corp. v. Philips Electronics North America Corp. et al*, 09-80 (D. Del., filed Feb. 3, 2009).

"There is still a robust practice for patent litigators. There are a lot of competitor cases," Sganga said. "This isn't the end of patent litigation or the end of valuable patents by any stretch."